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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1930

No. 525

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CORONADO BEACH COMPANY,
Defendant.

Appeal from the District Court of the United States for the Southern District of California.

BRIEF FOR DEFENDANT.

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Subject Index.

	Pages
STATEMENT OF THE CASE	1 - 14
1. The property described	3 - 8
2. Defendant's title originated on May 15, 1846, in a grant by the Government of Mexico to Pedro C. Carrillo, under the Colonization Law of August 18, 1824, and the Regulations of November 11, 1828	8 - 11
3. Plaintiff's claim of easement—its nature and consequences	11 - 14
(a) Title of Carrillo's successors confirmed January 12, 1857, by U. S. District Court	11, 12
(b) Appeal of U. S. Government from decree of confirmation dismissed	12
(c) United States patent issued to Carrillo's successors, June 11, 1869	12
I. THE GRANT TO CARRILLO IS NOT SUBJECT TO AN EASEMENT OF OCCUPANCY FOR MILITARY AND NAVAL PURPOSES	14 - 53
1. Easement defined	14, 15
2. Colonization Law of August 18, 1824	15 - 28
(a) It reserved no easement to the Mexican Federal Government. Its objects were the ungranted public lands—the proprietary lands—of the Mexican Nation	18 - 28
3. Regulations of November 11, 1828	28 - 43
(a) They, like the Colonization Law of August 18, 1824, affect the vacant and unoccupied public land	30 - 43
4. Cases as to riparian rights explained and distinguished; shown to rest on local law; inapplicability pointed out	48 - 53

Pages

II. THE DECREE OF CONFIRMATION AND THE RESULTING PATENT ASCERTAINED AND SETTLED THE TITLE OF RESPONDENT CONCLUSIVELY BETWEEN THE UNITED STATES AND RESPONDENT ..... 53 - 90

1. Act of March 3, 1851,—to ascertain and settle private land claims in California,—the jurisdiction thereby conferred upon the Board, the Courts, and in sequel, upon the Department of the Interior in respect to the survey and patent ..... 53 - 56

(a) The object of the Act was to prevent just such a controversy as is now pending in the case at bar by separating and distinguishing the public domain from that which had become, under the Mexican Government, private property ..... 56 - 59

(b) The "validity of the claim", as determined under the Act of March 3, 1851, includes a determination of the "legal operation" of the grant, and of "what the effect of the law of Mexico was", and of "every question which could arise on the title claimed" ..... 59 - 75

(c) The patent to the successors of Carrillo is conclusive, until vacated, as against the United States ..... 65 - 75

(d) The reservation of plaintiff's alleged easement should have been embodied in the decree and patent—illustrations ..... 75 - 90

III. IN NO EVENT, UNDER THE ACT OF MARCH 3, 1891 (26 Stat. 1095, 1099), CAN THE PLAINTIFF GO BEHIND THE PATENT ..... 90 - 97

List of Cases Referred To.

Pages in Brief

Arguello v. U. S., 18 How. 539.....4, 9, 10

Barker v. Harvey, 180 U. S. 72.....70, 71, 72, 73
Barker v. Harvey, 181 U. S. p. 499..... 48
Beard v. Federy, 3 Wall. 478.....65, 67, 71
Botiller v. Dominguez, 130 U. S. p. 252.....57, 58, 59
Boquillas Cattle Co. v. Curtis, 213 U. S. 342.....51, 52, 53
Butte City Water Co. v. Baker, 196 U. S. 119, 127 13

Camou v. U. S., 171 U. S. 277, 279..... 35, 36
Chambers v. Fisk, 22 Tex. pp. 521-2, 527, 528-9, 530-531 37
Charles River Bridge v. Warren Bridge, 11 Pet. 419, 641 31
C. B. & O. R. v. Chicago, 166 U. S. pp. 235-6..... 33
City of Los Angeles v. Los Angeles F. & M. Co., 152 Cal. 645 (217 U. S. 217).....48, 49, 50, 77

Domat, Civil Law, Par. 974..... 34

Eldridge v. Trezevant, 160 U. S. 452.....46, 47, 48

Fremont v. U. S., 17 How. 541.....29, 34, 55, 57, 59

Goode v. McQueen's Heirs, 3 Tex. 241, 251..... 18
Grisar v. McDowell, 6 Wall. 363.....82, 83, 84

Hall's Mexican Law..... 16
Hardin v. Jordan, 140 U. S. 371..... 50
Harvey v. Barker, 126 Cal. 262.....44, 56, 68, 69
Harvey v. Barker, 181 U. S. 481.....45, 46, 75, 76, 90
Hayes v. U. S., 170 U. S. p. 643..... 18

Jones on Easements, Section 422..... 34

Knight v. Land Association, 142 U. S. p. 200..... 13

La Roque v. U. S., 239 U. S. 62.....93, 94, 95
Light v. U. S., 220 U. S. 523..... 91
Los Angeles F. & M. Co. v. Thompson, 117 Cal. 594 .....62, 63, 64, 65
Los Angeles F. & M. Co. v. Thompson, 180 U. S. 72.. .....65, 66, 67, 68

Pages in Brief

Los Angeles Terminal Co. v. S. P. R. R. Co., 136 Cal. 36 15
Lynch v. Bernal, 9 Wall. 315.....61, 62, 80, 81, 82

Mitchell v. U. S., 9 Pet. 711.....78, 79, 80
Mitchell v. U. S., 15 Pet. 52..... 60

Northern Pacific Ry. Co. v. U. S., 227 U. S. 355..... 93

Phillips v. Mound City Association, 124 U. S. 605.... 73-75
Pollard's Lessee v. Hagan, 3 How. 212, 225..... 34
Pumpelly v. Green Bay Co., 13 Wall. 166, 182..... 32, 89

Republic v. Thorn, 3 Tex. 499..... 26, 37
Rodriguez v. U. S., 1 Wall. 582, 588..... 54

Salem Co. v. Stayton, 33 Fed. 146, 154..... 34

U. S. v. Arredondo, 6 Pet. 691, 733..... 24
U. S. v. Chandler-Dunbar Co., 209 U. S. 447..... 91, 92
U. S. v. Coe, 170 U. S. 681, 690..... 35
U. S. v. Cruz Cervantes, 18 How. 553, 555 *ad fin*..... 22
U. S. v. Elder, 177 U. S. p. 116..... 56, 59
U. S. v. Fossatt, 21 How. 445, 448..... 59
U. S. v. Osio, 23 How. 273..... 77, 78
U. S. v. Reading, 18 How. 1..... 25, 29
U. S. v. Ritchie, 17 How. 524.....12, 44, 54
U. S. v. Santa Fe, 165 U. S. 675.....85, 86, 87, 88
U. S. v. Turner, 11 How. p. 667..... 55, 59
U. S. v. Vallejo, 1 Black 541..... 16, 28
U. S. v. Vigil, 13 Wall. 449..... 16, 35
U. S. v. Whited, 246 U. S. 560..... 95, 96
U. S. v. Workman, 1 Wall. 705.....16, 30, 61
U. S. v. Yorba, 1 Wall. 412.....11, 13, 26

Wagner v. Hanna, 38 Cal. 116..... 15, 34

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Appeal from the District Court of the United States for the Southern District of California.

BRIEF FOR DEFENDANT.

Statement.

The case proceeds under the Act of July 27, 1917, c. 42, 40 Stat. 247. The Act of Congress authorized the President

> "to cause possession to be taken forthwith on behalf of the United States, for use for national

> defense, and, in connection therewith, as sites for permanent aviation stations for the army and navy and for aviation school purposes, of the whole of North Island, in the Harbor of San Diego, California".

Accordingly, on August 1, 1917, the date fixed by the pleadings (Tr. pp. 2, 5), the government took over the occupancy of this land, and has maintained the occupancy ever since.

The statute has a double aspect: One, as for the "determination of any rights" in North Island, whether of the claimants thereto, or of the United States; the other, as for the "appraisement of any rights private parties may have". Jurisdiction is committed "to the District Court of the United States for the Southern District of California, the proceedings to be prosecuted in accordance with the laws of the State of California relating to the condemnation of property for public use". The appellate jurisdiction is lodged in this court, by way of direct appeal from the judgment of the District Court, within ninety days after such judgment was rendered.

The question, then, of the title, and, next, the question of the value of the land as appraised in sequence, are the things to be seized. The pending controversy, as presented on the record, divides into a bill of complaint on the part of the United States, to quiet its title to the property, as by way of an alleged easement of occupancy for military and naval purposes; and into a supplemental inquiry

before a jury, into the value of the land. Upon the question of title, the transcript of the record in this court is designated No. 525; and upon the supplemental inquiry the transcript is designated No. 524. This brief pertains to transcript No. 525, and goes to the question of title. That question was resolved by the court below in favor of this respondent, to the full extent of the fee simple title. In due course, the value of the land was appraised by a jury. By an appeal from the determination of this respondent's exclusive title, and by writ of error as to the appraisement, it is sought to bring the controversy here.

The Act of Congress refers to the lands in question as "the whole of North Island, in the Harbor of San Diego, California". The complaint avers that

> "said tract of land is situated in the County of San Diego, State of California, and is known, designated, and described as the whole of North Island in the Harbor of San Diego, California" (Tr. p. 2).

And that said tract "is known, designated and described as the whole of North Island", is admitted by the answer (Tr. p. 5). It is set forth in the answer that the petition for confirmation, under the Act of March 3, 1851, filed on April 20, 1852, by the predecessors in interest of this respondent, designates the land as "the Island or *Peninsula* of San Diego" (Tr. p. 6); and that the decree of confirmation is of the land "known by the name of the Island or Peninsula of San Diego" (Tr. p. 8). In

referring to the decree confirming the title, the answer speaks of it as "confirming the title to the said island or peninsula of San Diego" (Tr. p. 10); and plaintiff, in its replication, refers to the title and the land in the same terms (Tr. p. 14).

The petition of Pedro C. Carrillo, the original grantee, was offered by counsel for plaintiff, at the hearing below, as "being the petition of Pedro C. Carrillo to the Governor of California, asking for a grant of the Island or Peninsula in the Port of San Diego" (Tr. p. 26). In this petition, the land is described as

> "a vacant land in the limits of this port, in the southern part, known by the name of 'la Ysla' or Peninsula which the Port of San Diego forms";

and the boundaries are given, three of which are by water, and one by land (Tr. p. 26). In the "informe", or report to the Governor as to the status of the applicant, and the condition of the land (Arguello v. U. S., 18 How. 539, 541), the place is referred to as "La Ysla", or Peninsula (Tr. p. 27). In the preliminary order of the Governor "acceding" to the request of the applicant (Arguello v. U. S., 18 How., p. 543), Carrillo is declared "owner in fee of the land known or named 'Isla' or Peninsula in the Port of San Diego, towards the part of the anchorage" (Tr. p. 27); and the corresponding title is directed to be issued (Aguello v. U. S., 18 How., p. 543). And in the grant itself, which closes the record or expediente, the premises are referred

to as "the Island or Peninsula in the Port of San Diego", and the boundaries are stated, three of which are by water and one by land (Tr. p. 28).

In the petition filed under the Act of March 3, 1851, asking confirmation of the grant, the land is designated as

> "the Island or Peninsula of San Diego, situate in the present county of San Diego, containing two square leagues, with the boundaries described in the grant, a copy of which is submitted" (Tr. p. 29).

The decree of confirmation refers to the land as "known by the name of the 'Island or Peninsula of San Diego'," and gives the boundaries, three of which are by water and one by land (Tr. p. 30).

In the mandate from the Supreme Court of the United States, dismissing, at the instance of the Attorney General, the appeal from the decree of confirmation made by the District Court, and remanding the cause for final proceedings therein, the language used is—"the Island or Peninsula of San Diego" (Tr. p. 37).

In the United States patent of June 11, 1869, the reference is

> "to a tract of land called the 'Island or Peninsula of San Diego', containing two square leagues, more or less, in the County of San Diego and State aforesaid, said claim being founded on a Mexican grant to Pedro Carrillo, made on the 15th day of May, 1846, by Pio Pico, then Constitutional Governor of the Department of California".

The boundaries stated in the decree of confirmation are set forth, three by water, one by land. The patent recites that

> "there has been deposited in the General Land Office a return with a plat of the survey of the said claim confirmed as aforesaid, authenticated by the signature of the United States Surveyor General of the State of California."

This plat is inserted in and made part of the patent (Tr. pp. 32-3).

A photographic copy "of plat of the Island or Peninsula of San Diego", is stipulated to be part of the record on appeal herein (Tr. p. 44). The statement follows:

> "For map above referred to see side page 198 of Record on Writ of Error" (Tr. p. 44).

This plat is authenticated by the signature of the United States Surveyor General for California; and bears the approval, as of June 11, 1869, of the Commissioner of the General Land Office. It is designated, on its face, as follows:

> "Plat of the Island or Peninsula of San Diego, finally confirmed to Archibald C. Peachy and William H. Aspinwall, surveyed under instructions from the U. S. Surveyor general by Henry Hancock, Deputy Surveyor, June and July, 1867, containing 4,185.46 acres."

For convenient reference, we have attached, as a frontispiece to this brief and to the brief in No. 524, in reduced form, a replica of the delineations of the plat which accompanies the patent. It will be seen, carrying in mind the boundaries of the original

grant, that the land in question is composed of a relatively long "pan-handle", proceeding from the main land and expanding into what have been popularly known as Coronado and North Island. It is along this pan-handle that the San Diego and Arizona Railway proceeds from the City of San Diego into Coronado, and from Coronado, across Spanish Bight, by bridge, into North Island. It will also be seen, from the record in No. 524, and will be more particularly referred to in the brief pertaining to that transcript, that during the construction of the United State Breakwater at the southern extremity of North Island, communication by railroad, in the movement of materials, was by tracks laid on the firm land between Coronado and North Island, and intervening between the south line of Spanish Bight upon the north, and the high water mark of the Pacific Ocean on the south. The granted land is, therefore, a peninsula—not an island, but almost an island; and a glance at the expansions of the Peninsula into Coronado—sometimes called South Island —and North Island, will make it easy to understand how, in popular speech, and even in legal papers, the granted land is designated as the Island or Peninsula of San Diego. The boundaries, set forth in the original grant, will now be understood graphically: on the north by the Bay of San Diego "towards the town"; on the south by the sea—Pacific Ocean; on the west by the Bay or anchorage of ships, now defined by the United States Survey and grant line; and on the east, where the pan-handle begins, by the main land.

It will appear from the plat of the survey, accompanying the patent, and from the reproduced map attached to this brief, that North Island, so called, is a part of the Peninsula, confirmed to Billings and others by the decree of the District Court of the United States, made final by the dismissal, at the instance of the Attorney General, of the government's appeal, and patented by the United States to Peachy and Aspinwall, from whom this respondent deraigns title. It was stipulated below, that the premises described in the complaint, that is to say, North Island, "are included within and are a part of the land described" in the decree of confirmation, and in the patent (Tr. p. 25). It was also stipulated that this respondent has succeeded to, and is now the owner of, the right, title and interest of the confirmees in the decree, and of the patentees in the patent (Tr. p. 25). It is this land, known as "the whole of North Island", that the plaintiff, on the allegation of an "easement" of perpetual occupancy, would, in effect, expropriate, and without a dollar of compensation, from this respondent, a bona fide purchaser, for value, through meane conveyances, from the original grantee.

The grant here was made under the Mexican laws of colonization and settlement—that is to say, the law of August 18, 1824, applicable to the states of the Mexican federation, as they were then constituted, and the regulations of November 11, 1828, promulgated by the Chief Executive of Mexico, under authority of the law of 1824, and applicable to the

territories, in distinction from states, of the Mexican Republic. These laws and regulations for the colonization and settlement of the public domain, had to do with the public, vacant lands of the country. The policy was to invite and encourage colonization and settlement of these vacant lands. This contemplated the introduction, in numbers, of foreign colonists; and, as well, the settlement of Mexican citizens on the land. Hence, the grants to impresarios or contractors, sometimes called pobladores, who engaged to introduce a body of foreign settlers; and hence, the distribution of lands to Mexican citizens, families or single persons (Arguello v. U. S., 18 How. 539, 547).

Grants to foreign colonists, however, were made with circumspection. The establishment of foreigners, in a considerable body, on the frontiers of the nation, or near the seacoast, might be fraught with danger to the security of the republic. Mexico had but recently achieved its successful revolt from Spain. The new independence might be menaced, at the seacoast, by the power of Spain. The frontiers, on the other hand, were in adjacency to the great republic of the north. The Mexican littoral and the Mexican border, should be secured against unfriendly or dubious occupation. It was, therefore, provided that colonization grants to foreigners, within twenty leagues of the border, or ten leagues of the seacoast, should first have the consent of the supreme executive power. No such condition was imposed in the case of a settlement

grant to a Mexican citizen (Arguello v. U. S., 18 How., pp. 547-8). That consent, however, once obtained, the foreign colonists would be in by a title as indefeasible as that of a Mexican grantee.

It is beyond doubting that the administration of the colonization and settlement law of 1824, was, in the first instance, committed to the several states of the federation—certainly, until the adoption of the Centralist Constitution of 1836, when the states were superseded by departments, under departmental governors appointed by the central authority. The power to grant the public vacant lands within their limits, in colonization and settlement, was vested by the law of 1824, in the states. A limitation upon state authority to make such grants, was imposed, as to foreign colonists, in the case of lands within the border and littoral leagues —the previous approbation of the General Executive was first required. That limitation respected, the state was free to administer the public vacant lands, within its limits, and to grant them as well to foreign colonists as to Mexican settlers. The lands in question, comprehended and dealt with by this law, are the public vacant lands. And it is further provided in the law of 1824, that the authority of the state to subject these vacant lands to a grant, whether to a foreigner or to a native, may be anticipated by the intervention of the general government, if, in the judgment of the federal government, it should be deemed necessary to use any portion of these public lands for the construction of ware-

houses, arsenals or other public edifices. In short, for these public purposes, and in advance of any translation of the public domain into private ownership, the federal government, in priority to the state, had the first call on the vacant lands.

But the contention of the plaintiff in the case at bar, and the strain put upon it by its allegation, goes beyond this. It is not proposed here to vindicate the right of the general government, whether in a state or in a territory, to subject unoccupied and ungranted public lands to the military and naval uses of the nation, in advance of any disposition thereof by local authority. The bald proposition is, that, after the public vacant land, unqualified by any action or disposition of the general government, has been granted by competent local authority to a settler in good faith, relying upon the promise and invitation written on the front of the law, and after the land has ceased to be vacant, and ceased to be public, none the less the general government may step in, and turn the settler out without compensation or redress, and occupy the land indefinitely and wholly. The proposition is startling, it is without precedent, and it involves portentous consequences.

On May 15, 1846 (U. S. v. Yorba, 1 Wall., pp. 422-3), the grant in question was made to Carrillo (Tr. p. 28). That was 75 years ago. On the 20th of October following, Carrillo conveyed to Simmons, and on September 3, 1850, Simmons conveyed to the petitioners under the Act of March 3, 1851 (Tr. p. 29). On January 12, 1857, in the United States

District Court for the Southern District of California, on appeal from the Board of Land Commissioners, and in a proceeding tantamount to the institution of a suit *de novo* (U. S. v. Ritchie, 17 How., 524, 533), the grant was confirmed, without reservation or exception (Tr. p. 30), and thereafter, on motion of the Attorney General of the United States, the government's appeal from the decree of confirmation was dismissed, and the cause remanded, with leave to the petitioners to proceed upon the decree of the District Court as under a final decree (Tr. p. 37). The patent was issued to Peachy and Aspinwall, the substituted plaintiffs, on June 11, 1869—the final patent and final record of the United States (Tr. pp. 32-4). We are dealing here with a grant 75 years old, and with a patent of the United States issued over half a century ago.

In 1824 and in 1828, Texas—the State of Coahuila and Texas—was a state of the Mexican federation. It was a frontier or border state. The Mexican territory of New Mexico, comprising our own states of New Mexico and Arizona, was border land. The Mexican territory of California, now our own State of California, had a littoral of more than a thousand miles. If the extraordinary and strained contention of the government, in this case, is to be sustained, thousands upon thousands of acres of land within the twenty border leagues, or within the ten littoral leagues, in the State of Texas, in the State of New Mexico, in the State of Ari-

zona, and in the State of California, are clouded and imperiled in its title. The result would be, in the language of Mr. Justice Field (Knight v. Land Assn., 142 U. S., p. 200), a "frightful unsettlement of titles". Of the claim put forward on the part of the government here, it may be said, as was said from a different point of view, in the communication from the American Secretary of State, on March 18, 1848, to the Mexican Minister of Foreign Relations, quoted in the argument for the United States in U. S. v. Yorba, 1 Wall., at p. 118:

> "These Mexican grants (referring to certain grants which had lapsed into desuetude anterior to the treaty of Guadalupe Hidalgo) it is understood covered nearly the whole of the seacoast, and a large portion of the interior of Texas. They embraced thriving villages, and a great number of cultivated farms, the proprietors of which have acquired them honestly by purchase from the state of Texas. These proprietors are now dwelling in peace and security. To revive dead titles, and suffer the inhabitants of Texas to be ejected under them from their possessions, would be an act of flagrant injustice, if not wanton cruelty. Fortunately, this government possesses no power to adopt such a proceeding. The same observations equally apply to such grantees in New Mexico and Upper California."

And in Butte City Water Co. v. Baker, 196 U. S. 119, 127, it is said by this court:

> "Finally it must be observed that this legislation was enacted by Congress more than thirty years ago. It has been acted upon as valid through all the mining regions of the country. Property rights have been built up on the faith of it. To now strike it down would

unsettle countless titles and work manifold injury to the great mining interests of the far west. While, of course, consequences may not determine a decision, yet in a doubtful case the court may well pause before thereby it unsettles interests so many and so vast—interests which have been built up on the faith not merely of congressional action, but also of judicial decisions of many state courts sustaining it, and of a frequent recognition of its validity by this court."

I.

THE GRANT TO CARRILLO WAS NOT SUBJECT TO THE ALLEGED EASEMENT OF OCCUPANCY FOR MILITARY AND NAVAL PURPOSES.

The allegation of the complaint is (Tr. p. 2)

> "That the plaintiff is the owner of an *easement,* estate, and interest in and to the tract of land hereinafter described, *for use* for the defense or security of the nation, and, in connection therewith, as sites for *permanent* aviation stations for the army and navy and for aviation school purposes."

It is further said that since August 1, 1917, plaintiff has been "in the possession, *occupancy and use* thereof *for the purposes* above mentioned".

An easement of permanent, indefinite occupancy and use—that is the category to which plaintiff's alleged interest is assigned.

> "An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use

> out of or over the estate of another" (Los Angeles Terminal Co. v. S. P. R. R. Co., 136 Cal. 36, 48).

The easement here is not claimed by a grant from Carrillo, or his successors in interest, to the plaintiff. It is claimed as a reservation. It is in the nature of a military and naval reservation. Of course, the difference is only of circumstance between the reservation of an easement by the grantor, and the subsequent transfer of an easement by the grantee.

> "A reservation of an easement in the deed by which the lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the land" (Wagner v. Hanna, 38 Cal., p. 116).

It is said, in terms, by plaintiff, in its replication in this case:

> "That the land described in the complaint was granted to one Pedro Carrillo by the then Governor of California, Pio Pico, on May 15th, 1846;
>
> "And that said grant was so made by said governor pursuant to, under the conditions of, and subject to the provisions of, the Act of the Mexican Congress of August 18th, 1824, and the rules and regulations of said Congress of November 21st, 1828, and *particularly* under the provisions of *Article 5* of said Act of *August 18th, 1824*, and Article 8 of said Act of November 21st, 1828" (Tr. p. 13).

Strictly speaking, the regulations of November 21, 1828, were not "regulations of said Congress".

They were executive regulations, promulgated by the government under authority derived from the fifteenth article or section of the law of August 18, 1824, an act of the Mexican Congress, and were meant to apply to the territories in distinction from the states. The fifteenth article of the law of 1824 reads:

> "The government, in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic" (Hall's Mexican Law, p. 149).

And in the preamble to the regulations of 1828, it is recited:

> "It being stipulated in the fifteenth article of the General Law of Colonization of the 18th of August, 1824, that the *government,* in conformity with the principles established in said law, shall proceed to the colonization of the territories of the republic, and it being very desirable, in order to give to said article the most punctual and exact fulfillment, to *dictate some general rules* for facilitating its execution in such cases as may occur, *his Excellency has seen fit to determine* on the following articles" (Hall, p. 150) (U. S. v. Vallejo, 1 Black, pp. 551, 552; U. S. v. Workman, 1 Wall., p. 762; U. S. v. Vigil, 13 Wall., pp. 450, 453).

Article 8 of the regulations of 1828, mentioned in plaintiff's replication, provides for a statement in the grant,

> "that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given" (Hall, p. 151).

It is from Article 5 of the laws of 1824, that plaintiff would spell out this far-fetched easement in land

neither public nor vacant, separated from the public domain by grant of competent authority, and resting in private ownership. This is the article dealing with public vacant lands within the limits of the states, under which, in advance of the exercise by the state of its dispositive power in the premises, the general government, for defensive purposes, is given a first call upon the occupancy and use of "these lands". It reads:

> Art. 5. "If for the defense or security of the nation, the *federal* government should find it expedient to make use of any portion of *these* lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so with the approbation of the general congress, or during its recess, with that of the government council" (Hall, p. 148).

Laws of August 18th, 1824, for the colonization and settlement of public vacant lands within the states.

The laws of 1824 were passed under a federal regime. They went upon a recognition of the states, as such,—of their relative independence and autonomy in matters of internal polity. Mexico had successfully revolted from Spain. Iturbide's brief candle of imperialism was soon snuffed out. On January 31, 1824, the constitutive act, a fundamental scheme of organic bases, recognizing the states of the federation, was adopted by the provisional, representative assembly, known as the Constituent Congress. Under this act, the general constituent congress was elected. It proceeded, in full recognition of the political status of the states, to pass

the law of August 18, 1824; and again, on October 24, 1824, in like recognition of the status and relative autonomy of the states, it adopted the permanent constitution of October 24, 1824 (Hayes v. U. S., 170 U. S. p. 643).

As expressed by the Supreme Court of Texas at the December term of 1848 (Goode v. McQueen's Heirs, 3 Tex, 241, 251):

> "The federal party, having gained the ascendency and overthrown centralism, were laying down the programme of a federal republic composed of the several different states, and each of these states to be independent of the federal government so far as related to their internal polity; the federal government to be charged with peace or war, and everything connected with foreign relations and intercourse with other nations."

The first article of the law of 1824 pledges "to those foreigners who may come to establish themselves in the territory, security in their persons and property"; and the second article makes it plain that the public lands—not lands which have passed into private property, and to the security of which the first article pledges the faith of the nation—are the things dealt with.

> "The objects of this law," says the second article, "are *those national lands* which are neither *priate property* nor belong to any corporation or town (pueblo), and *can therefore* be colonized."

The potential capacity of the public lands, in distinction from private holdings,—of "those national

lands" which are not private property,—for purposes of colonization, is here brought out.

Next comes article three, by which, in consonance with the federal idea, the power to make laws for the colonization of the public lands within the limits of the states, is vested in the legislatures of the several states. This article reads:

> "*To this end,* the Congress *of the states* will form, as soon as possible, the laws and regulation of colonization of their respective demarcations, with entire conformity to the constitutive act, the general constitution, and the rules established in this law."

Two limitations, however, are imposed on the power of the state. That power is limited, as to the public lands within twenty leagues of the limits of any foreign nation, or within ten leagues of the seacoast, by the requirement that the previous approbation of the general executive must first be had; and again by the authority retained in the federal executive to subject "these lands" to occupancy and use for defensive purposes. The first limitation is in article four. It reads:

> "Those territories (obviously used in the sense of lands, and so translated in White's Recopilacion Vol. 1, p. 160) comprised within twenty leagues of the boundaries of any foreign nation, or within ten leagues of the seacoast, cannot be colonized without the previous approval of the supreme executive power."

The second limitation is in article five. It reads:

> "If, for the defense or security of the nation, the federal government should find it expedient

> to make use of any portion of *these lands* for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general congress, or, during its recess, with that of the government council." and (Hall, p. 148, White, Vol. 1, p. 160)

Article six exonerates foreign colonists, for a period of four years, from any capitation tax; Article seven, somewhat anomalous in the view that one legislature may not curtail the faculties of a succeeding legislature, provides that the federal legislature itself cannot prohibit the entry of foreign colonists, "except compelled to do so with respect to the individuals of some nations, by powerful reasons;" and by way of added circumspection, it is said in section eight, that the government, "without prejudicing the object of this law, will take such precautionary measures as may be necessary for the general security, in respect to foreigners who come to colonize." It is further provided in section eight, according to Hall's distribution of the sections,—a separate and ninth section in White's distribution—bringing the law, now, to bear upon Mexican citizens as such:

> "In the distribution of lands, Mexican citizens are to be attended to in preference; and no distinction shall be made amongst these, except such only as is due to private merit and services rendered to the country, or, in equality of circumstances (under equal circumstances, White), residents in the place to which the lands distributed belong."

Article ten relates to the disposition of public lands by the general government, in aid of military or civil officers of the federation, and again brings it out that the power of the general executive, under this law, when put forth on the indicated occasions, is exercised on the vacant, ungranted lands,—on this particular occasion, in respect to the vacant lands, not of the states, but of the territories. It reads:

> "If, by the decree of capitulation, according to the probabilities of life, the supreme executive should see fit to alienate any portion of land in favor of any military or civil officers of the federation, it may so dispose of the *vacant* lands of the territories."

Article eleven fixes the maximum allotment to any one person—one square league of irrigable land; four, of seasonal (Hall) or arable (White) land; and six, for raising cattle (Hall), or grazing land (White),—eleven square leagues in all.

Article twelve inhibits transfers by the new colonists "in mortmain;" article thirteen guarantees the contracts "which the impresarios may make with the families which they bring out at their expense," provided they are otherwise lawful; and article fourteen imposes upon the colonist or settler, the requirement of residence within the republic.

Finally, article fifteen (in Hall's distribution; sixteen in White's distribution) provides:

> "The government, in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic."

(1) The grant to Carrillo was not a grant to an impresario, "bringing out" a body of foreign colonists. It was not a grant to a foreign colonist. It was a grant to a native Mexican citizen and resident (Tr. p. 26). Such a grant, made to an individual, and to a Mexican citizen, is to be distinguished from grants of land "made the subject of colonization" (U. S. v. Cruz Cervantes 18 How., 553, 555, ad fin.)

> "It is evident" said this court in the Arguello case (Arguello v. U. S., 18 How. p. 547) "from an inspection of this act of 1824 and consequent regulations of 1828, that they contemplate two distinct species of grants: 1. Grants to impresarios, or contractors, sometimes called pobladores, who engaged to introduce a body of foreign settlers; 2. The distribution of lands to Mexican citizens, 'families or single persons'."

In the Arguello case, it was held by this court that the first eight sections of the law of 1824, "apply wholly to colonists and foreigners."

> "The ninth section," it is said, "first speaks of the distribution of lands to individuals and families, as distinguished from colonists, and provides that Mexican citizens should be preferred, without distinction of classes, except as to those who have rendered special service to their country."

The court goes on:

> "Thus we have seen that the first eight sections apply wholly to colonists and foreigners. It would be contrary to every canon of construction to apply the provisions made for them, to the subject introduced for the first time

in the ninth section, or to select the fourth section as applicable to native citizens, while the other seven are confined by their terms to foreigners."

And again:

"The regulations of 1828, made for the purpose of carrying into execution the law of 1824, evidently give this construction to that act. It makes a clear distinction between impresario contracts for colonization, and grants to Mexican citizens. In conformity with the fourth section of that act, it requires grants to impresarios to have the sanction of the supreme government, while those made to individuals or families need only the approval of the territorial deputation. (As to territorial deputation, and the equity of a grant even without its approval, see U. S. v. Reading, 18 How., pp. 7-8). This may be said to be a legislative construction of the act of 1824, and demonstrates that this restraint of grants within the littoral leagues had no application except to colonies of foreigners" (18 How., pp. 548-9).

The total exclusion, then, of any colony of foreigners, from the border or littoral leagues, within the limits of the state, was competent, in the first instance, to the general government.

"It would also seem," said the district judge in the court below (Tr. p. 21), "that the Mexican government could, with as much propriety, have made a distinction between a Mexican citizen and a foreigner concerning the right of occupancy, as provided in article five, as to have made the distinction in article four".

(2) But, again: The alleged easement of occupancy, under article five of the law of 1824, is

attributable to the *public* lands, to the vacant lands of the nation; it is not related to lands upon which the state has already exercised its dispositive power, and which have passed, as a fact accomplished, into the vested right of private ownership.

> "Whatever the legislative power may be," this court has said, "its acts ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property, to which they may be fairly applicable, and not particularly applied by the legislature, no silent implied and constructive repeals, ought ever to be understood as to divest a vested right." (U. S. v. Arredondo, 6 Peters 691, 733.)

The law of 1824 was designed to attract settlement, population, and cultivation to the vacant land of Mexico. It was an invitation, not to the native citizen alone, but to the foreigner as well. It pledged the faith of the nation to the vested rights of the settlers. In its opening article it promised to the strangers who came within its gates, "security in their persons and property". It declared, in the second article, that "the objects of this law are those *national lands* which are neither private property nor belong to any corporation or town". In the sixth article it expressed its policy and favor by exempting foreigners from any head tax, for four years after the enactment of the law. And in article seven, the federal legislature went the anomalous length of assuming to bind succeeding legisla-

tures "not to prohibit the entry of foreigners to colonize," unless compelled, on occasion, "by powerful reasons".

> "It is enough to say (U. S. v. Reading, 18 How., p. 8) that the Mexican republic, from the time of its emancipation from Spain, always dealt most liberally with foreigners in its anxiety to colonize its vacant lands. It invited them to settle upon her territory by promises of protection of them and their property. And by the first article of the decree of 1828 for colonizing her vacant lands, foreigners were included with those to whom the governors of the territories might make grants of land for the purpose of cultivating and inhabiting them."

Article four was a limitation upon the power of the respective states to grant public land within the border or littoral leagues, "without the previous approval of the supreme executive power"; and article five, in immediate sequence, limits the power of the respective states by the authority reserved to the general government to subject "*these* lands" to occupancy and use for defensive purposes. "These lands", the lands this law was dealing with, are the pubile lands, the vacant lands; they are not the lands which have been translated, by appropriate action, into the vested right of private ownership. The foreigner, it is true, at the frontier or on the seacoast, required action ulterior to the authority of the state. His grant needed the previous approbation of the federal executive. But that approbation once given, the state was authorized to com-

municate to him a title as perfect, a right as firmly vested, as any inhering in a native Mexican citizen. If the federal government would establish a military reservation, an arsenal or a fortification, the vacant ungranted lands of the state were open to its occupancy. In the territories it was supreme and exclusive,—there was no interposing state. It is not to be endured, in any reasonable system of legislation, that the colonist or the settler, invited and importuned to make a home for himself and his family on the vacant land of the country, can be turned out, on the instant, at the policy or whim of the general government, without compensation or redress.

> "The *object* of the general colonization law of 1824 and the regulations of 1828, which were adopted to carry that law into effect, was the *settlement* of the *vacant* lands of the republic." (U. S. v. Yorba, 1 Wall. 412, 423.)

And in the twelfth article of the regulations of 1828, it is said in terms (Hall, p. 151):

> "Every new colonist, after having cultivated or occupied the land agreeably to his capitulation, will take care *to prove the same* before the municipal authorities, in order that the necessary record being made, he may consolidate and secure his *right of ownership,* so that *he may dispose freely thereof.*"

At the December term of 1848, in the case of Republic v. Thorn, 3 Tex. 499, 505, the Supreme Court of Texas, dealing with the validity "of a claim to land within the twenty border leagues", arising

under a Mexican grant of May 5, 1834, took occasion to say:

> "By this law (of August 18, 1824), all the *vacant* lands of the nation were declared subject to colonization, and the *states* were authorized to form colonization laws or regulations for their respective states, in conformity with the constitutive act, the general constitution, and the regulations of the national colonization law. The *power of disposing* of the *public* lands, or of appropriating *any portion* of *them* to the *uses* and *purposes* of the *federal* government, *except so much as might be necessary* for the erection of warehouses, was relinquished and ceded to the states—the general government, for colonization purposes, retaining control only over such lands as lay within the territories of the republic."

If the federal government "should find it expedient to make use of any portion of *these* lands" (article five, law of 1824) for an arsenal or a warehouse, it was within its competency, to anticipate the action of the state, and appropriate the land for that purpose; or to anticipate the grant of a territorial governor, and thereby forestall his authority to grant the land into private ownership. Judge Hoffman illustrates this historically in the case of Palmer v. United States, 1 Hoffman 249, 269. He says:

> "The fifth article of the law of 1824 provides that the government of the federation may make use of any portion of the lands *of the nation,* to construct warehouses, arsenals, etc., it may deem expedient, with the consent of congress. It is to be presumed, therefore, that the appropriation and occupation must *have*

> *been* made by the government of the federation. Until, then, the federal government determined *to abandon them,* no governor of a department would be at liberty to treat their sites as *vacant public* land, because, through accident, neglect, or the disturbed condition of public affairs, their garrisons might have been withdrawn, or the fortifications in some degree dismantled. The fort or castle occupied a position unmistakably indicated by nature as the site of a defensive work for this harbor. It had been selected as such, perhaps, by the Spanish conquerors, and the United States has since, at the same point, erected the most extensive fortifications on this coast. It is not conceivable that, under a general power to distribute *vacant* lands to actual settlers, it could have been intended to clothe the governor with discretionary power to give to a private individual a spot so necessary to the national defense, *which had long been used for the purpose,* and on which *the cannon of the nation still remained.*"

Regulations of November 21, 1828.

These regulations are summarized in U. S. v. Vallejo, 1 Black 541, 551-2. The supreme executive government, it is said, acting under the sixteenth section (White's distribution) of the law of 1824,

> "on the 21st November, 1828, established regulations for the granting and colonization of the *public* lands in the *territories,* and, among others, in California".

The territorial governors "are hereby authorized to grant *vacant* lands within their respective territories", to either Mexicans or foreigners who may petition for them, with the object of cultivation or settlement,—the said grants to be made "according

to the laws of the general congress of 18th August, 1824, and under their qualifications".

> "Then follows a series of preliminary proceedings, specially enjoined for the purpose of ascertaining the fitness of the petitioner to receive a grant, and also of ascertaining if the land asked for may be granted *without prejudice to the public* or individuals; and it is declared, in view of these, the governor will grant or not the land; but if the grant is made, it must be in strict conformity with the laws upon the subject, and specially with reference to the law of 1824; and the grants made to individuals or families shall not be definitively valid without the previous consent of the departmental assembly." (Such consent, however, was not necessary to be shown, as a prerequisite to confirmation under the act of March 3, 1851: U. S. v. Reading, 18 How. 1, 7-8; Fremont v. U. S., 17 How. 541, 562.)

This court, in the Vallejo case, after noting section eight of the regulations, providing for the patent or title, signed by the governor, and section nine, providing for its recordation, goes on to remark:

> "There are many other stringent provisions and conditions imposed which it is not important to refer to specially; it is sufficient to say, that the *system* thus established by the sovereign power of the nation for the grant and distribution of the *public* lands, exhibits a deliberation and care over the subject that is in striking contrast with the system of granting the public lands under our government, and furnishes the highest evidence of the extreme interest the Mexican government took in guarding against impositions and frauds by or upon the political chiefs in the execution of the law."

Article seven of these regulations makes a distinction between grants to impresarios, upon the one hand, and grants to Mexican families or individuals, on the other. The impresario grant, "to colonize the many families", to be definitely valid, must await the approval of the supreme government. Article twelve has already been noted,—providing, after occupancy and cultivation, for the proof and record thereof before the municipal authorities, to the end that the colonist "may consolidate and secure his *right of ownership* so that he may *dispose freely thereof*". Article thirteen provides for "the reunion of many families into one town," the "interior government" of which shall be assimilated to that of the existing towns of the republic; and it is provided in section fifteen, that house lots shall be assigned—"the land given for a house shall be one hundred varas". "Is it conceivable", to borrow Judge Hoffman's expression in the Palmer case, supra, that the title of the householder, in a town originating in a Mexican grant of land within the border or littoral leagues, can be displaced, after whatever tract of time, by the "easement" put forward here? The laws of 1824, and the regulations of 1828, were not meant to confiscate vested rights in granted and occupied land. They bore upon the vacant and unoccupied public land. As this court said in U. S. v. Workman, 1 Wall. 745, 761, an original and direct proceeding under the act of March 3, 1851:

"Ample authority was conferred upon the governor of California to grant *vacant* lands belonging to the supreme government. Such authority was derived from the colonization law of the 18th of August, 1824, and the regulations of the 21st of November, 1828, as has been affirmed by repeated decisions of this court. But all of those decisions proceed upon the ground that the authority conferred is *limited* and *restricted* to the granting of *unoccupied public* land. Grants under those laws were required to be made subject to the approval of the departmental assembly, and consequently unless such approval was obtained, the title was not regarded as perfect and complete. (Though properly subject to confirmation—Reading and Fremont cases, supra.) *Public establishments* of the department could not be granted under these laws, nor even lands which were *in the lawful possession and occupancy of persons claiming provisional title under the government.*"

Indeed, if the "easement" of confiscation, set up here could, as it cannot, be strained out of article five of the laws of 1824, and imputed as a sovereign prerogative to the Mexican government, it would not be communicable, by treaty or otherwise, to a government of constitutional guarantees like ours, in which it is repugnant to our traditions and policy, to the letter of our federal constitution and of our state constitutions, to take over the private property and vested rights of the citizen, except upon just compensation. It is aptly said by Mr. Justice Story, in his dissenting opinion in the Charles River Bridge case, 11 Pet., at page 641:

"Although the sovereign power in free governments may appropriate all the property, public as well as private, for public purposes, making compensation therefor; yet it has never been understood, at least never in our republic, that the sovereign power can take the private property of A. and give it to B., by the right of 'eminent domain'; or that it can take it at all, except for public purposes; or that it can take it for public purposes, without the duty and responsibility of making compensation for the sacrifice of the private property of one, for the good of the whole. These limitations have been held to be fundamental axioms in free governments like ours, and have accordingly received the sanction of some of our most eminent judges and jurists."

In Pumpelly v. Green Bay Company, 13 Wall., pp. 177-8, it is said by Mr. Justice Miller:

"It will be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendations of jurists, statesmen, and commentators as placing the just principles of the common law beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the

government, and would make it an authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors."

And in Chicago & Burlington Railroad v. Chicago, 166 U. S., at pp. 235-6, this court said:

"In Davidson v. New Orleans, above cited (96 U. S. 97, 102), it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the fourteenth amendment. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments, and commiting to the judiciary, expressly or by implication, authority to enforce the provisions of such construction. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on constitutional law says, 'is that of enjoying private property without undue interference or molestation'. The requirement that the property shall not be taken for public use without just compensation is but an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

And, further, as Mr. Chief Justice Taney puts it in the Fremont case, 17 How., p. 564—the case of a Mexican grant of 1844, conveyed to an American citizen in 1847, and confirmed under the act of March 3, 1851:

> "Any Mexican laws, inconsistent with the rights of the United States, or its public policy, or with the rights of its citizens, were annulled by the conquest."
>
> "It cannot be admitted," this court has said (Pollard's lessee v. Hagan, 3 How. 212, 225), "that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it."

There is, of course, no suggestion or hint of this supposed easement in the treaty of Guadalupe Hidalgo. If it may not be imparted as a sovereign prerogative, what of its proprietary aspect, looking, now, at the Mexican government in the status of a proprietor? In this point of view, it would be an easement, not appurtenant, as between a servient and a dominant tenement, but an easement personal and in gross, and therefore not an assignable quantity (Jones on Easements, sec. 422; Salem Co. v. Stayton, 33 Fed. 146, 154; Wagner v. Hanna, 38 Cal. 116). And such was the rule, as well, of the civil law, prevailing in the Latin countries (Domat, Civil Law, paragraph 974).

The history of Mexico is chequered with revolution and change,—the revolt from Spain, the brief empire of Iturbide, the constitution of 1824, the constitution of 1836, the constitution of 1843, the war with this country and the conquest of California by the American forces on July 7, 1846. The constitution of 1824 was a federal constitution; it organized the republic into states. In 1836, centralism had the upper hand, and a constitution was framed, abolishing the states, and substituting departments under the jurisdiction of governors appointed by the central authorities (U. S. v. Coe, 170 U. S. 681, 690). In the Coe case, it was held that, from and after the adoption of the constitution of 1836, no power was vested in the former states, as such, to make grants of public land (Camou v. U. S., 171 U. S. 277, 279). But the procedure in the territories, under the laws and regulations of colonization, even under the later constitution of of 1843, like that of 1836 central in aspect, remained unaltered (U. S. v. Vigil, 13 Wall. 449, 450, 453). In Camou v. United States, 171 U. S. 277, the laws of August 18, 1924, out of which the alleged easement here is attempted to be deduced, were somewhat fully gone into. This case would seem to dispose of the contention that this government may, or that the Mexican government could, appropriate, without compensation, for military occupancy and use, a tract of granted land, no longer vacant and public, title to which had passed, by competent authority, whether state or national, into private ownership.

The grant in the Camou case, was a state grant. It was made by the State of Sonora. It was issued by state authority on April 29, 1833,—anterior, therefore, to the constitution of 1836, which abolished the states. It was not a colonization grant. It was a grant by auction and sale, under a law of the State of Sonora.

The opinion of this court by Mr. Justice Brewer, reviews the provisions of the constitutive act of the Mexican federation, of July 31, 1824; and of the constitution of October 4, 1824, and finds that these provisions

> "at least point to some control by the states over vacant lands within their limits, and suggest the exercise by those states of the right to make concessions of those lands" (p. 281).

Attention is then drawn to the colonization law of August 18, 1824. While the grant in question was not under the colonization law, the court refers to that law

> "as showing a recognition by the general government of some authority on the part of the states in reference to the *vacant* lands. It will be seen," the opinion goes on, "that while article two speaks of 'the lands of the nation', article three directs the states to enact colonization laws in conformity to the general provisions of the constitution. So that the actual management of colonization affairs was put within the control of the states, subject, of course, to the superior dominion of the general government. Article ten provides that military rights to lands, though created by the nation, shall be attended to by the states; thus implying

> at least that, for convenience, administration of the vacant lands was entrusted to the states. Obviously the thought here was, that there should not be two places in which the administration of the public lands should be carried on; and so, in article eleven, it was provided that if, in the judgment of the nation, it was expedient to grant to a military or civil officer any public lands, it was to be made from *vacant* lands in the territories. And finally, in article sixteen, as though to separate the administration of the public lands in the states from those in the territories, it is distinctly declared that the *national government* will colonize the *territories* of the republic. As heretofore said, all this, of course, amounts only to *assigning to the states* the *administration* of the *vacant* lands for purposes of colonization."

And the court finds it unnecessary to resolve the question whether the actual title to public lands within the limits of the state, dwelt in the states, as has been affirmed judicially (Chambers v. Fisk, 22 Tex., pp. 521-2, 527, 528-9, 530-31; Republic v. Thorn, 3 Tex., p. 509).

The court now takes up the law of August 4, 1824, under which the state claimed authority to make the grant in question, as by proceedings of an auction and sale. This law deals with the general revenues, pertaining to the federal government, and with the special revenues, pertaining to the states. Revenues from such sources as import and export duties, tobacco, powder, are attributed to the general government; so, likewise, revenues from the territories of the federation. It is then provided, in the ninth article:

> "National property, in which is included that of the inquisition and temporal property of the clergy, or any other rural or urban property that belongs, or shall hereafter belong to the public exchequer" (shall be general revenue).

Article ten provides:

> "The buildings, offices, and the lands attached thereto, which belong, or have belonged, to the general revenues, and those that have been maintained by two or more of what were formerly provinces, are at the disposal of the government of the federation."

Then comes article eleven:

> "The revenues not included in the foregoing articles belong to the states."

On a view of these articles, the court finds the ninth article indefinite, "in that it fails to define what is national property". The language is broad enough to include all public lands, "and yet if it was intended to include such lands, it would seem scarcely necessary to add the clause including those taken from the clergy". The tenth article merely refers to public buildings and the grounds attached to them; "not to *vacant public* lands". The eleventh article does not define what revenues belong to the states, "and depends for its scope upon the significance and force of the prior articles". If, then, these articles were all, "it would be difficult to infer from them that the vacant public lands were given to the states for purposes of sale or for appropriation of the proceeds of such sales".

But these articles are not all. There is more behind. In this same statute there is a provision that

> "the sum of $3,136,875—estimated as the deficit in the general expenses—shall be apportioned among the states of the federation";

and the apportionment is made and stated. Other sections of this same statute require the delivery by the states, each month, of their several parts of the above apportionment, and a final adjustment of the amount thereof between the government and the states.

> "This implies", the court observes, "that, within the limits of the state, there were certain matters of revenue, out of which the states were to collect the sums apportioned to them, and to return the same to the general treasury".

Subsequent legislation, says the court, throws light on the meaning of this revenue law; and just here, the court draws attention to the law of April 6, 1830.

The law of April 6, 1830, is now set forth in terms as follows (pp. 284-5):

> "The government shall have power to appoint one or more commissioners to visit the colonies of the *frontier states,* to contract with their legislatures for the *purchase,* in the name of the federation, of the *lands* they may consider suitable and sufficient for the *establishment of colonies* of Mexican and of other nations, to enter into such arrangements with the colonies already established as they may deem proper for the security of the republic, to see to the exact compliance with the contracts (impresario

contracts) upon the entry of new colonies, and to examine as to how far those already entered into have been complied with."

Next is quoted article four of this same law of April 6, 1830. It reads:

> "The *executive* shall have the *power* to *take the lands* he may consider *suitable for fortifications and arsenals,* and for *new colonies* and shall give the *states credit* for their value *on the accounts they owe the federation.*"

We have seen what these accounts are which the states owe, and the amount of which, $3,136,875, has been apportioned among the states. Here, now, in paragraph four of the law of April 6, 1830, is an authoritative national interpretation of section five of the law of April 18, 1824. The lands which the federal executive may deem it expedient to make use of for the purpose of arsenals or other defensive purpose—the lands upon which the alleged easement is to be exercised—are the vacant public lands, taken from the *states,* and to be paid for *to* the *states* by a credit upon the amount of the indebtedness of the states to the general government. They have not yet arrived into private ownership, they are still in the states, ungranted to private owners, from the states they are to be taken, and to the states compensation for them is to be made.

This court proceeds to remark upon paragraph four as follows:

> "The language of this decree is very significant, and clearly recognizes *some title in the states;* for why should commissioners be author-

ized to contract with the legislatures of the states for the *purchase* of lands which belong to the nation? It also clearly recognizes the right of the states to sell *these vacant lands* and apply the proceeds in settlement of the demands made against them by the general apportionment of the revenue law of 1824. It declares that the *executive* may *take the lands* he considers *suitable for fortifications, arsenals,* and for *new* colonies, and, *at the same time,* provides that *he* shall *give the states credit* on the amount they owe the confederation. But why should any credit be given *if these* lands, so taken by the executive, were the property of the nation, and the states without authority to sell them or receive the proceeds of sale? If, during all these years, the lands were the property of the nation, were to be held and sold only by the nation, and the proceeds thereof to be accounted for directly to the nation, *why should it be decreed* that *if* the *nation* takes any part of them *for arsenals and other public purposes,* credit for the value thereof is to be entered upon the amounts due *by the states* to the nation? We find it difficult to escape the force of this decree of 1830. It indicates that although the language of the revenue decree of 1824 is indefinite, and does not in terms name *vacant public lands,* yet both the nation and the states understood that its effect was to grant authority *to the states* to sell *such lands,* and appropriate the proceeds in settlement of the amounts charged against them by the nation. We see no other way in which to give reasonable force to the language of this decree of 1830, and it must be held to be *a national interpretation* of the revenue decree of 1824" (pp. 285-6).

And the court adds:

"But we are not limited to *this authoritative national exposition* of the meaning of the reve-

> nue law of 1824. The testimony in the several cases of a similar nature now before us, including therein the reports of the officers of this government sent to examine the archives of Mexico, discloses that the state of Sonora, at least, assumed that the revenue act of 1824 *authorized its disposal* of the *vacant public lands,* and acting on that assumption did in a multitude of cases make sales thereof. In this connection, it may be observed that the constitution of the state of Sonora, or State of the West, declares article 47, that the right of selling lands belongs to the state. This constitution bears date May 11, 1825. Law, No. 30 of that state, of May 20, 1825—the law referred to by the Treasurer General (of the state) in in the expediente—recites that 'The congress has seen fit to decree the following provisional law for the purchase of the *lands of the state.*' Subsequent legislation of the state is in the same line" (p. 286).

This court points out that the constitution, the laws, and the actual transactions of the state, in respect to the disposition of the public lands, must have come to the notice of the federal congress, and without objection thereto. Sections eight and nine of article 161 of the national constitution of 1824, are set forth, making it the duty of each Mexican state—

> "To present annually to each one of the houses of the General Congress a minute and comprehensive report of the amounts that are *received and paid out* at the treasuries within their limits, together with a statement of the *origin of the one and the other.*"

And also—

> "To forward to the two chambers (of the federal government), and when they are in recess, to the council of the government, *a certified copy of their constitutions, laws, and decrees.*"
>
> "It may be assumed", this court continues, "that these requirements of the national constitution were complied with, and that the constitutions, laws and decrees of the state, and the proceedings had in reference to these several sales of land, were reported to the congress of the nation. We find no act of that congress setting aside such legislation or sale. This is significant," the court observes, and it refers to Clinton v. Englebrecht, 13 Wall., 434, 446, as an appropriate citation. (pp. 286-7.)

In the result, it is said by the court:

> "Our conclusion is, that, *at the time* of these transactions, the several states had authority to make sales of *vacant public lands* within their limits, and that such sales, unless annulled by the national government, must be considered as grants to be recognized by this government under the terms of the treaty of 1853" (Gadsden Treaty).

Servidumbres

In the grant to Carrillo (Tr., p. 28) it is prescribed as a condition:

> "He may enclose it, without prejudice to the *crossings, roads,* and servitudes (The Spanish word, in the original, here translated 'servitudes', is 'servidumbres'), and enjoy it freely and exclusively, making such use or cultivation of it as may best suit him."

The suggestion has been thrown out, by the way, and it would seem without serious conviction, that the "easement" attributed to Article 5 of the law of 1824, may possibly be affiliated upon the term "servidumbres". It is plain to be seen that what the grant has in its intendment, is to protect established roads, crossings, and other things of like nature, from interference by the grantee. In Harvey v. Barker, 126 Cal., 262, the California Indians were opposing to the confirmed grant on which plaintiff stood, an easement of occupancy which had not been presented for confirmation, as required of any derivative Spanish or Mexican title, under the act of March 3, 1851. It was held by the Supreme Court of California that any Indian title by easement must fail, for want of presentation to the commission under the act of March 3, 1851; and this court, as will be noticed presently, affirmed the holding. But it was contended, nevertheless, for the Indian title, that the easement of occupancy was reserved and retained by reason of the customary language in the grant, as in Mexican grants generally, against interference with crossings, roads, and "servidumbres" (U. S. v. Ritchie, 17 How., p. 536). Counsel took the position, to give it in the language of the Supreme Court of California:

> "That under the Mexican law, Warner (the original grantee of the confirmed and patented grant of 1844) held the legal title subject to the easement of the Indians' possessory rights, and that the confirmation of the legal title and issu-

ance of the patent in no way changed the character of such title, nor freed it from the easement in favor of the defendants." (p. 267)

An earlier grant, in 1840, had been made to Pico (p. 263), but that grant failed of confirmation and was rejected. (p. 270) The Pico grant enjoined it upon Pico "not to molest the Indians that thereon may be established" (p. 263). The conditions in the confirmed grant to Warner were like those in the Pico grant, "with the exception that it omits entirely the clause 'not to molest the Indians that thereon may be established'" (p. 265).

It was said by the Supreme Court of California:

> "It is useless for counsel on behalf of appellants to contend that the Warner grant is the same as the Pico grant in reference to the rights of the Indians. Not to interfere with roads and other usages (servidumbres), under the circumstances cannot be tortured into the equivalent of a reservation in the grant to 'not molest (prejudicor) the Indians that thereon may be established'."

Harvey v. Barker was affirmed in this court, 181 U. S., 481, 498, 499.

> "The grant to Pico," it was here said, "was made subject to the condition that he should 'not molest the Indians that thereon may be established'. No such condition was attached to the subsequent grant to Warner."

It is further said by this court:

> "Some discussion appears in the briefs as to the meaning of the word translated 'usages' (servidumbres), which appears in both grants,

and it is contended by the plaintiffs in error that it is equivalent to the English word "servitudes', and is broad enough to include every right which anyone may have in respect to the premises, subordinate to the fee. We shall not attempt to define the meaning of the word standing by itself. It may be conceded that it was sometimes used to express all kinds of servitudes, including therein *a paramount right of occupation,* but the context seems to place a narrower meaning upon its use here. Thus, in the first grant, not only is there the distinct provision that the Indians established on the lands shall not be molested, but the grantee 'is allowed to fence it in without interfering with the roads, cross-roads, and other usages' (servidumbres). In the second (the Warner grant), the grantee is 'allowed to fence it in without interference with the roads and other usages' (servidumbres). Obviously, it is in these two clauses contemplated, that the fencing is to be without interference with roads and other usages or burdens. It does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross-roads, *or other things of like nature.*"

An analogy, also, is fetched from far—from the banks of the Mississippi. Eldridge v. Trezevant, 160 U. S., 452, is cited. It was, as this court said,

"The doctrine existing in the territory of Louisiana before its purchase by the United States and continuing to this time, that lands abutting on the rivers and bayous are subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensa-

tion. This doctrine is said to have been derived from the Code Napoleon, whose 649th and 650th articles were as follows:

'Servitudes established by law have for object the public or communal utility, or the utility of private persons. Those established for the public or communal utility, have for object the tow paths along the navigable or floatable rivers, the construction or repairing of roads, and other public or communal works. All that concerns this kind of servitude is determined *by laws or particular regulations*'."

"But whether," this court went on to say, "the servitude in question was derived from French or Spanish sources, or from local and natural causes, we need not inquire, because it is *explicitly asserted* in the Civil Code of Louisiana, article 661, in the following terms:

'Servitudes imposed for the public or common utility relate to the space which is left for public use by the adjacent proprietors, on the shores of navigable rivers, and for the making and repairing of levees, roads, and other public or common works. All that relates to this kind of servitude is determined by laws or particular regulations'."

And this court, quoting from the Supreme Court of the state of Louisiana, adds:

"In this state (Louisiana), *so much exposed to ruinous inundations*, the public have the undoubted right, on the shores of the Mississippi River, to the use of the space of ground necessary for the making and repairing of the public levees and roads. C. C., Art. 661. It was the condition of the ancient grants of land on the Mississippi River, and sufficient depth was always given to each tract, to prevent the exercise of the public rights from proving ruinous to the individual."

Plainly, the court, in the Eldridge case, was not dealing with a clause against interference by the grantee "with established roads or cross-roads *or other things of like nature,*" found in Mexican grants, confirmed to claimants of land in California (Barker v. Harvey, 181 U. S., p. 499).

The rule as to riparian rights.

Reference is made in the government's brief to the case of City of Los Angeles v. Los Angeles Farming & Milling Co., reported in 152 Cal., 645, and 217 U. S. 217.

This case is not the instance of an original proceeding under the act of March 3, 1851, in which a claimant presents his grant for confirmation, and to which the claimant, as plaintiff, and the United States, as defendant, are the parties. The Los Angeles case was a controversy between third persons. It was subsequent upon, and outside of, the act of March 3, 1851.

The Los Angeles Milling Company, under a Mexican grant, of date June 17, 1846, duly confirmed and patented, was the owner of a tract of land, riparian to the Los Angeles river, and lying up-stream from the City of Los Angeles (217 U. S. p. 219). Other things being equal, as matter of simple topography, the milling company was the upper, and the City of Los Angeles was the lower, proprietor. For that City, too, came down to the banks of the stream.

But other things were not equal. Los Angeles began as a Spanish Pueblo, established in 1781. The

City of Los Angeles, as the successor of the Pueblo, presented its claim under the act of March 3, 1851, for confirmation, and the same was duly confirmed and patented.

> "Under the laws of the Kingdom of Spain, said Pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the complaint herein, to use all the waters of the river, and such paramount right continued to exist under that government and under the Mexican government, until the acquisition of California by the United States" (217 U. S., p. 221).

No federal question, no issue of law, under the constitution, statutes and treaties of the United States, was presented. Both parties stood upon titles derived respectively from Spanish and Mexican origin, duly confirmed and patented under the Act of March 3, 1851, and those titles, as for their delimitation, took both parties down to the Ripa of the Los Angeles River. To what extent the two proprietors, as riparians, had rights in the waters of the stream, and, as between themselves, who had the paramount right—this was not a federal question, it was a question of the local law depending upon the comparative rights of an individual and a pueblo, both riparians, to the water as it flowed. The local law, the law of Spain and Mexico, put the community or pueblo, justly enough, ahead of the individual. That was the case, and that was why this court declined jurisdiction.

The Supreme Court of California quotes the language of this court in Hardin v. Jordan, 140 U. S., 371:

> "In our judgment, the grants of the government of land bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie".

And the Supreme Court of California goes on to say:

> "The right of a riparian owner in fee of land to the use of natural water running through it, is subordinate to any paramount right to the use of such water existing *under the general law* in some other person. The only question in the case, therefore, is whether, under the general law of the locality, the old pueblo of Los Angeles, and the respondent herein as its successor, had and have, as against appellant, the prior and paramount ownership of the use of so much of the water of the Los Angeles River as is necessary for its inhabitants and for general municipal purposes" (152 Cal., p. 650).

The court finds this question answered by its own decisions. The pueblo had the superior right.

> "The riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the water; and *semble* that the pueblos had a preference or prior right to consume the waters even as against an upper riparian proprietor".

And upon this, the case went off. (152 Cal., 651.)

When the case came here (217 U. S. 218), jurisdiction was declined upon the ground that no federal question was presented, and that the issue in hand was resolvable by the law of the locality. The act of March 3, 1851, was not the source of title, but the Spanish, or Mexican, law. The act of Congress "did not originate federal rights or titles, but merely confirmed the old ones." "And this court has frequently held that the extent of the right and title of a riparian owner under a patent is one of local law" (p. 233).

> The defect of the Milling Company's contentions "from the standpoint of federal jurisdiction is, that this court has already determined, in the cases above cited, that the act of 1851 was a confirmatory act; that by its terms it did not undertake to *originate* titles, or make the *patents*, to be issued in pursuance of the decisions of the Commission, conclusive *except upon the United States;* and that the extent of the riparian rights belonging to pueblos or persons, receiving such patents, are matters of local or general law. In this view, the Writ of Error must be dismissed for want of jurisdiction" (p. 234).

Boquillas Cattle Co. v. Curtis, 213 U. S. 342, like the Los Angeles case, was a controversy over the use of running water, determinable by the law of the locality, and arising between a riparian proprietor and an appropriator. It came to this court on appeal from the judgment of the territorial court of Arizona. The land of the cattle company was riparian to the San Pedro River. The company derived

its title from a grant of the state of Sonora in 1833, confirmed, under the act of March 3, 1891, by a decree of the Court of Private Land Claims on February 14, 1899, and a patent from the United States, of December 14, 1900 (p. 342).

The claim of the defendants rested on appropriation—"That they have been the first to appropriate the water" (p. 343).

This court goes at once to the local law, as declared in the opinion of the territorial court.

> "Whatever may have been the general law throughout the republic of Mexico on the subject of waters, it is reasonably certain that in the state of Sonora the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this Territory, irrigation was practiced in the Santa Cruz Valley prior to the cession; and it is well known the right of appropriation, without regard to the riparian character of the land, was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law as modified by custom" (p. 342).

And this court points out, with some particularity, the provisions of the statutory Bill of Rights of the Territory, dealing with the use of running water, declaring the streams public, recognizing the right of land owners in general to withdraw the water by irrigating canals, passing, if need be, through private lands, subject to assessment for damages, awarding precedence, in time of scarcity, to the oldest titles, and enacting that

> "the regulation of acequias (irrigating canals), which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used up to this day" (p. 346).

The appropriator, therefore, was sustained on the foot of the local law. The grant and patent, it is true, carried the Cattle Company to the bank of the stream; but the patent did not "create" or originate the title,—that went, for its *fons et origo,* to the Mexican law. Standing on the river bank, what rights the patentee had in the water flowing at his feet, made a question for the local law. The Act of Congress, with its decree and patent, did not purport either to create or to enlarge the grant. It confirmed the grant, leaving the question of supervening water rights to the standards of the local jurisdiction (p. 344).

It is now, therefore, on the whole submitted that under Article 5 of the law of August 18, 1824, the grant to Carrillo was not subject to the alleged easement of occupancy for military and naval purposes.

II.

THE DECREE OF CONFIRMATION AND THE RESULTING PATENT ASCERTAINED AND SETTLED THE TITLE OF THIS RESPONDENT CONCLUSIVELY BETWEEN THE UNITED STATES AND RESPONDENT.

Act of March 3, 1851.

This is the Act "to ascertain and settle the private land claims in the state of California" (9 Stats.,

631). A board of three commissioners is constituted for the purpose (Sec. 1).

> "Each and every person (Sec. 8) claiming lands in California by virtue of *any* right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims;
>
> "And it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced *in behalf of the United States,* and to decide *upon the validity of the said claim.*"

By a proceeding nominally appellate, but really in the nature of a suit *de novo* (Section 9; Section 12 of amendatory Act of August 31, 1852, 10 Stats., 99; U. S. v. Ritchie, 17 How. 524, 533), either party might apply to the District Court "to review the decision of the said commissioners, and to decide *on the validity of such claim*". And by Section 10 of the original Act, an appeal lay, "on application of the party against whom judgment is rendered", to this court.

> "The primary object of the Act (Rodrigues v. U. S., 1 Wall. 582, 588) was to *ascertain* and *separate* the *public domain* from that which had become, under the Mexican government, private property; and hence, in every case, the *claimant* was *plaintiff* or actor, and the *United States* was *defendant.*"

Section 11 provided:

> "That the commissioners herein provided for, and the district and supreme courts, in deciding *on the validity of any claim* brought before them under the provisions of this act, shall be governed by the Treaty of Guadalupe Hidalgo, *the laws, usages, and customs of the government from which the claim is derived,* the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

It was, therefore, to the regulations of 1828, authorized by the law of 1824, that the commissioners and the courts were to look for *"the laws and usages* by which the validity of a Mexican title is to be determined" (U. S. v. Elder, 177 U. S., p. 116). These Mexican laws, "upon which the titles to land" in California depended, "must be judicially noticed and *expounded"* by the commissioners and the courts. (U. S. v. Turner, 11 How., p. 667.) They

> "were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a state of the union" (Fremont v. U. S., 17 How., p. 556).

Section 13 makes it the duty of the Surveyor General of California "to cause all private claims which shall be finally confirmed to be accurately surveyed"; and for all claims finally confirmed "a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or sur-

vey of the said land, duly certified and approved by the Surveyor General of California". And by Section 15, it is provided:

> "That the *final decrees* rendered by the said Commissioners, or by the District or Supreme Court of the United States, or any *patent* to be issued under this Act, *shall be conclusive between the United States and the said claimants only,* and shall not affect the interest of third persons."

Section 13, it may be added, has a feature of limitation, and in that connection, a declaration as to what lands shall be deemed a part of the public domain of the United States. The language is:

> "All lands, the claims to which have been rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court; and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this Act (it was for a failure to present the Indian easement of occupancy within the two years, that it was pronounced against in Harvey v. Barker, supra), shall be deemed, held, and considered *as part of the public domain of the United States.*"

What was the object of the Act of March 3, 1851, if it was not to prevent just such a controversy as is now pending in the case at bar? The eighth section sweeps within the jurisdiction of the commission and the courts all lands in California claimed "by virtue of *any* right or title derived from the Spanish or Mexican government". And so it was that the easement of occupancy, in Harvey v.

Barker, supra, was rejected for want of presentation within the two years. All claims, perfected and legal, or inchoate and equitable—"any right or title"—were subjected to examination. The end was, to give peace and stability to titles, and to foreclose future controversies. In Fremont v. U. S., 17 How. 542, 543, quoted and approved by this court in Botiller v. Dominquez, 130 U. S., at page 252, it was said:

> "It will be seen from the quotation we have made, that the eighth section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination, and to be passed upon by the court. The object of this provision appears to be, *to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy.*"
>
> "The main purpose of the statute", said Mr. Justice Miller in the Botiller case (p. 249) "*was to separate and distinguish* the lands *which the United States owned as property,* which could be sold to others, either absolutely or by permitting them to settle thereon with pre-emption rights, *or which could be reserved from public sale entirely,* from those lands which belonged, either equitably or legally, *to private* parties under a claim of right derived from the Spanish or Mexican governments.
>
> "When this was done" (he continues), "the aim of the statute was attained. The order of the Commissioners, or the decree of the court, established, as between the United States and the private citizen, *the validity or the invalidity of such claims,* and enabled the government of the United States, out of all its vast domain,

> to say *'this* is *my* property', and also enabled the claimant under the Mexican government, who had a just claim, whether legal or equitable, to say, *'this* is *mine'*."
>
> "No doubt could exist," says Mr. Justice Miller (p. 250), "and none whatever would have been suggested, if this statute, instead of requiring the individual claimants to take notice that they were called upon to establish their title and to come forward and do so, had provided *that the United States should sue everybody* who was found in possession of any land in California at the time the treaty was made, and thus compel him to produce his title, if he had any. Such suits would have been sustained without hesitation, as being legal, constitutional, and according to right".

If, then, as Mr. Justice Miller suggests, the United States had found us in possession, and had sued us, setting up its alleged easement, against which we opposed our grant, and if the suit had resulted in a final decree and patent to us, without reservation or exception of an easement of occupancy, would it lie in the mouth of the government, after more than half a century of time, to renew the assertion of its alleged interest in the land by way of easement? What difference would it make that in such a proceeding we happened to be defendant, while in the proceeding as actually taken, under the Act of March 3, 1851, we were the plaintiff, and the government was the defendant? Indeed, Mr. Justice Miller goes on to remark (p. 250):

> "*What difference can it make, then,* that the party who is supposed to possess all the evidences which exist to support *his* claim, is called

upon to come before a similar tribunal and establish it by a judicial proceeding? It is beyond question that the latter mode is the more appropriate one to carry out the object intended, and better calculated to save time and expense, both to the government and to the party, and to arive at safe and satisfactory conclusions."

Now, then, Section 5 of the law of August 18, 1824, and all the other sections of that law, and all the regulations of November 21, 1828, were judicially known to the commission and the courts in confirming the grant now before the court, and they were "the laws and usages", under Section 11 of the Act of Congress, "by which the *validity* of a Mexican title is to be determined" (U. S. v. Fremont, supra; U. S. v. Turner, supra; U. S. v. Elder, supra). And if, resident in the terms of Section 5, there had lurked some easement of occupancy in the government, it would have been the duty of these tribunals to have brought it to the light, to have declared it, to have reserved it by the decree, and thereby to have defined "the legal operation" of the grant.

"What are the questions", this court asked in U. S. v. Fossatt, 21 How. 445, 448, "involved in the inquiry into the validity of a claim to land?" The court answers:

"It is obvious that the answer to this question must depend, in a great measure, upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evi-

dence is forged or fraudulent; or it may involve an inquiry into the authority of the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made; or it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title, or has been forfeited for a breach of conditions. Questions of each kind here mentioned have been considered by the court in cases arising under this law (the Act of March 3, 1851).

"But, *in addition* to these questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary, *and legal operation*, that are *equally essential* in determining the validity of the claim. In affirming a claim to land under a Spanish or Mexican grant to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that ownership and possession of land of definite boundaries rightfully attach to the grantee."

And the court, happily enough, mentions the case of Mitchell v. U. S., 15 Pet. 52, in which

"certain property *about Fort St. Mark's* was *excepted* in the *original decree of confirmation*, and *reserved to the United States*, and the Superior Court in that decree was directed to ascertain the extent and boundaries of the land *reserved*".

The District Court may have been wrong, we venture to think it was not, in confirming this grant without any reservation to the United States of this alleged easement; the attorney general may have

been wrong in dismissing the appeal, with leave to claimant to proceed on the decree of the District Court as under a final decree; the Department of the Interior may have been wrong in delineating the grant on the plat of the survey, and in issuing the patent. But if they were all in error, it was error in the exercise of a clear jurisdiction. They were all empowered to decide, right or wrong, and their decision is now unassailable. *Sit finis litium.*

> "The board, having jurisdiction of the claim," said this court in Lynch v. Bernal, 9 Wall., p. 322, "its validity and title to recognition and confirmation were subjects for that tribunal's determination, and its adjudication, however erroneous, cannot be collaterally assailed on the ground that it was made upon insufficient evidence. The rule is as applicable to inferior and special tribunals as it is to those of superior or general authority,—that where they have once acquired jurisdiction, their subsequent proceedings cannot be collaterally questioned for mere error or irregularity."

U. S. v. Workman, 1 Wall, 175, was a direct proceeding under the Act of March 3, 1851, between the claimant and the United States as parties, for the confirmation of a Mexican grant of land in California, made by the governor, Pio Pico, on June 8, 1846. The grant was not one in colonization or settlement. It was in the nature of a sale of the Mission of San Gabriel, under alleged authority of the governor. The Commissioners, under the Act of March 3, 1851, confirmed the claim. Their decision was affirmed by the decree of the District

Court (p. 745). On appeal to this court, the decree of the District Court was reversed. It was held here that under the law of August 18, 1824, and the regulations of November 21, 1828, "ample authority was conferred upon the governor of California to grant *vacant* lands belonging to the supreme government". But such authority was limited "to the granting of unoccupied public lands". "Public establishments of the department could not be granted under those laws, nor even lands which were in the lawful possession and occupancy of persons claiming provisional title under the government" (p. 761). It was held, on a review of the powers of the governor, that he acted in excess of his authority in directing the sale of mission lands. That was "a power he never possessed" (p. 765). The commissioners and the District Court were found to be in error, the decree was reversed, and the petition for confirmation was dismissed (p. 766). Such was this direct proceeding.

Now, in the light of this direct proceeding, and of the ruling of this court, the case of Los Angeles Farming and Milling Company v. Thompson, 117 Cal. 594, is to be read; for the grant here, like the grant in the Workman case, was of mission lands, under an order of Governor Pico, who executed the grant on June 17, 1846. The grant was confirmed by the commissioners, whose decision remained final, and was followed, on January 8, 1873, by the United States patent (pp. 597, 598). This case, however, was not a direct proceeding between claimant and

the United States. It was an action by the successor in interest of the patentee, against the defendants, who were in possession, to recover the land. The plaintiff rested his title on the patent (p. 597).

The defendants stood upon the alleged infirmity of the grant and confirmation. They offered to introduce in evidence the petition of the claimant to the board for confirmation, together with the grant from Pico, and the decree of confirmation made by the board. Their point was, that it appeared by the petition and the grant, "that petitioner did not claim said lands by virtue of any right or title derived from the Spanish or Mexican government". And they contended

> "that said grant was void, for the reason that it was an attempted grant of mission lands, reserved from and not subject to grant under the laws and regulations of the Mexican government; and that the facts stated in said petition and in said grant proved that said board had no jurisdiction over the subject-matter of said case, and that the decree confirming said claim was without jurisdiction and void" (p. 598).

The trial court rejected the offer, and excluded the evidence. This ruling was assigned as error by the defendants.

> "In support of their claim, they contend that the only claims to land which the Board of Land Commissioners had jurisdiction to pass upon were such as were 'by virtue of any right or title derived from the Spanish or Mexican government' and that, as the petition for confirmation showed that the claim was not by virtue of such right or title, the Board had no

jurisdiction over it; and that its decree of confirmation, as well as the patent issued thereon, were void, as being the acts of officers *without authority* over the subject matter upon which they acted; that it appears upon the face of the petition that the Board of Land Commissioners had no jurisdiction in the matter *for the reason that at the date of the grant the governor of California had no authority to make a sale of this land*" (p. 598).

The Supreme Court of California now proceeds to say:

"In support of the latter proposition, appellants cite the cases of United States v. Vallejo, 1 Black 541, and United States v. Workman, 1 Wall. 745. These were cases, however, in which *appeals* were taken by the United States *directly* from the decree of confirmation, and were *direct attacks* upon the validity of the judgments appealed from; whereas the evidence offered in the present case, is for the purpose of a collateral attack upon the validity of the decree of confirmation. The Board of Land Commissioners was authorized to adjudicate *upon the validity* of every claim for lands in California which purported to be derived from the Spanish or Mexican government. The *validity of the claim* included the *authority of the governor* to make the grant, as well as *the existence or effect of the laws of Mexico concerning the same* (a palmary instance of the existence and effect of the laws of Mexico concerning the grant, would be this very section 5 of the laws of 1824, invoked to deduce the alleged easement); and the *jurisdiction* of the board extended to *the determination of each of these questions as fully* as to determining whether there had been a full compliance with the forms of law in making the grant, and its

judgment thereon cannot be collaterally assailed *on account of any error* it may have committed in reference thereto" (p. 599).

The Supreme Court of California quotes from the decision of this court in Beard v. Federy, 3 Wall. 478, both as to the effect of the decree, and as to the effect of the patent.

As to the decree:

> "The Board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence."

As to the patent:

> "By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government, this record, *so long as it remains unvacated,* is conclusive, and it is equally conclusive against parties claiming under the government by title subsequent" (pp. 599-600).

The Thompson case was brought here. It is reported in 180 U. S. 72. In support of the assignment of error, it was urged "that the governor of the Californias had no authority to make the grant, and therefore the decree of confirmation was without that authority of law, and was absolutely void,

and a mere nullity. And it is hence further contended that the patent based on and reciting the decree was void on its face". In a word, "the grant being void, it could not be the basis of a claim to land 'by virtue of any right or title derived from the Spanish or Mexican government'" (Section 8, Act of March 3, 1851). This court disposes of the contention in this expressive language:

> "We think that counsel put too limited a signification on the words of section 8, that the claim shall be 'by virtue of any right or title derived from the Spanish or Mexican government'. The words, of course, were descriptive of the class of claims of which the Board of Land Commissioners was given jurisdiction. They made a special tribunal of the Board, limited to hear a particular class of claims, but *not limited* to the questions of law and fact which *could arise* in passing on and determining the validity of any claim of the class. The power to consider whatever was necessary to the validity of the claim—propositions of law or propositions of fact—the fact of a grant, or the power to grant, was conferred. If there should be a wrong decision, the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy. It allowed an appeal to the district court of the United States, and from thence to this court. Legal procedure could not afford any better safeguards against error. *Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the Act of 1851 to give repose to titles.* It was enacted not only to fulfill our

treaty obligations to individuals, but to settle and *define what* portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the Board, and barred all from future assertion which were not presented within two years after the date of the Act (Sec. 13). The jurisdiction of the Board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction *to decide rightly or wrongly.* If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant *or by the United States* to the district court (Sec. 9). Indeed, the proceedings in the district court were really new, and further evidence could be taken (Sec. 10). Upon the confirmation of the claim by the commissioners, or by the district or supreme court, a *patent* was to issue and to be *conclusive against the United States* (Sec. 15)" (pp. 77-8).

As to the effect of the patent, the court said, quoting from Beard v. Federy, 3 Wall. 478:

"This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, *so long as it remains unvacated,* is *conclusive.* And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent *as a record of the government* that its security and protection chiefly lie. If parties asserting interest in lands acquired since the acquisition of the country, could deny and controvert this

> record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, *an instrument of quiet and security to its possessor*" (p. 79).

Harvey v. Barker, 126 Cal. 262, has been referred to on the question of "servidumbres". It is illustrative at this point. There were two grants, it will be recalled, an earlier grant to Jose Pico, of 1840, reserving the possessory right—an easement of occupancy, of the Indians established on the land; and a later grant of 1844, to Warner, containing no reservation of the easement (p. 263). When the successor in interest of Warner undertook to recover possession, standing upon the United States patent issued to Warner on January 16, 1880, he was opposed by this alleged easement. It was claimed, on behalf of the Indians:

> "That under the Mexican law, Warner held the legal title *subject to the easement* of the Indians' possessory rights, and that the confirmation of the legal title and issuance of the patent in no way changed the character of such title, *nor freed it from the easement* in favor of the defendants" (p. 267).
>
> "The *grant* to Warner *neither reserved nor preserved* any possessory or other right or supposed right in the Indians,"

as the Supreme Court of the State points out (p. 270). And again:

> "We are not permitted to go behind the patent in a case like this" (p. 271).

"If any rights whatever can be conceded to the appellants under the former Mexican government", the court goes on to say, "such rights were in the nature of private property, or a right dependent upon the will and pleasure of the state or nation. If, as claimed, it was *a right to possess, occupy, and use land, that amounted to a title to property.* It being a title or right to property, whether in fee simple or possessory, merely, derived from the Mexican government,—under the Act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation" (p. 274).

And again:

"But it is claimed that Warner took his title subject to the trust or right of the Indians. Neither the *grant* nor the *patent* contains anything to support this contention, and there is no privity between them and the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon" (p. 277).

The court concludes:

"From the foregoing it follows: 1. That the decision of the Land Commissioners and other appropriate officers of the government of the United States, holding to the effect that the land in question was, at the time it was granted, *vacant,* and subject to *absolute alienation,* is *conclusive* on the defendants and all others. 2. That the grant to Warner of the 'Valle de San Jose' was not subject to any right or interest in the defendant; but that he claimed and held the land granted in hostility to the defendants' pretentions, and there is no trust relation existing between Warner and the said Indians. 3. That the *patent* issued to

> Warner upon the confirmed grant to the premises in controversy is *conclusive* against the defendants" (pp. 277-8).

When Barker v. Harvey came here (181 U. S. 481), the language of Thompson v. Farming Company, 180 U. S., 72, 77, was quoted with approval:

> "Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the Act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but *to settle and define* what portion of the acquired territory was *public domain*" (p. 490).

The court having cited some of its previous rulings, goes on to say:

> "These rulings go far towards sustaining the decision of the Supreme Court of California in the present cases. *As between the United States and Warner,* the patent is as conclusive of the title of the latter *as any other patent from the United States* is of the title of the grantee named therein. *As between the United States and the Indians,* their failure to present their claims to the Land Commission, within the time named, made the land, within the language of the statute, 'part of the public domain of the United States'. 'Public domain' is equivalent to 'public lands', and these words have acquired a settled meaning in the legislation of this country. The words 'public lands', are habitually used in our legislation to describe such as are subject to sale *or other disposal* under general laws" (p. 490).

Again:

> "So far, therefore, *as these Indians are concerned,* the land is rightfully to be regarded as part of the public domain, and subject to sale and disposal by the government, *and the government has conveyed to Warner*" (p. 490).

Touching the language of the 15th section of the Act of March 3, 1851, providing that the patent shall not "affect the interests of third persons" the court inquires, "who may take advantage of this stipulation?" The answer is quoted from Beard v. Federy, 3 Wall., 478, 492, 493, as follows:

> "When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, *record evidence* of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, *so long as it remains unvacated,* is *conclusive.* * * * The term 'third persons' as there used, does not embrace all persons other than the United States and the Claimants, but *only* those who hold *superior titles,* such as will enable them to resist successfully any action of the government is disposing of the property" (p. 491).

And, finally, it is appositely said:

> "If these Indians had any claims founded on the action of the Mexican government, they

abandoned them by not presenting them to the commission for consideration, and they could not, therefore, in the language just quoted, 'resist successfully any action of the government in disposing of the property'. If it be said that the Indians *do not claim the fee,* but only *the right of occupation,* and, therefore, they do not come within the provision of Section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,'—it may be replied that a claim of *a right to permanent occupancy of land* is one of *far-reaching effect*; and it could not well be said that lands which were *burdened with a right of permanent occupancy* were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it had full title, and of which it has given to an Indian tribe a *temporary* occupancy, and that over lands which were subjected, *by the action of some prior government,* to a *right of permanent occupancy*; for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal. Surely a claimant would have *little reason* for presenting to the Land Commission his claim to land, and securing *a confirmation* of that claim, if the only result was to transfer *the naked fee* to him, *burdened by an Indian right of permanent occupancy*" (pp. 491-2).

And, surely, the claimant of the Carrillo grant would have little reason for presenting to the Land Commission his claim to the land in question here, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by this alleged easement of permanent

occupancy. Or, as the district judge said in the court below, referring to the Botiller case,

> "a patentee under this statute could not assert with very much confidence concerning the land he got, that 'this is my property', if the United States could step in at any time and take possession of it forever" (Tr. 22).

Phillips v. Mound City Association 124 U. S. 605, was a suit for the partition of a ranch in Los Angeles County, title to which was derived from a Mexican grant of 1837. After the grant, and prior to the treaty of Guadalupe Hidalgo, which was proclaimed July 4, 1848, a partition of the land, it was claimed, had been made under the authority of an appropriate Mexican tribunal by which the share of each of the three owners in common had been set off to him in severalty, and possession taken accordingly (p. 606).

One of the three owners presented his claim for confirmation, under the Act of March 3, 1851, as for an *undivided* part of the rancho. The two other owners likewise presented their petitions, but as for the confirmation, each of them, "of the *specific* tracts allotted to him in the alleged partition". The Commission confirmed the claims "so as to give to each claimant the lands which had been set off to him in severalty by the partition". The district court affirmed the confirmation, adjudging, however, the title of the claimants "to be good and valid, each to one equal *undivided* third part" of the land. The patent was issued "unto Henry Dalton, Ygnacio

Palomares, and Ricardo Bejar, and to their heirs," for "the tract of land known by the name of San Jose, embraced and described in the foregoing survey", but with a reservation that neither the confirmation nor the patent "shall affect the interest of third persons; to have and to hold the said tract known by the name of San Jose, with the appurtenances, unto the said Henry Dalton, Ygnacio Palomares and Ricardo Bejar, and to their heirs and assigns forever, with the stipulation aforesaid" (pp. 606-7).

In denial of the contention that the patent inured to the benefit of the respective grantees "according to their respective interests as set off to them in severalty in the alleged partition made under Mexican authority before the treaty", the Supreme Court of California held that no such partition had in fact been made by any judgment of a competent Mexican tribunal, and that the rancho was held and owned by the three successors in interest of the original patentees "as tenants in common, each owning an *undivided* third" of the land (p. 607).

The suit was brought here by Writ of Error to the Supreme Court of the State. The plaintiffs in error stood on the alleged Mexican partition, and its allotments in severalty. A motion to dismiss for want of jurisdiction was interposed, and this, on the ground that no federal question was involved (p. 607).

This court held that no federal question was involved.

"The only question is, whether such partition was made, and upon that, the decision of the state court is final, and not subject to review. It drew in question no Act of Congress, nor any authority exercised under the Constitution or laws of the United States and therefore the decision of the state court could not be opposed either to the laws or to any authority exercised under the laws of the United States" (p. 612).

The state court, it is pointed out,

"decided no question of federal law, but only that the legal effect of what had been done was not such as was required to bind the parties by the partition. In this particular, the case stands precisely as it would if, instead of a partition under the form of a judicial proceeding, one had been made by the voluntary conveyances of the parties after the original grant and before the treaty" (p. 611).

A court of equity could give full effect to what was done by decreeing the necessary conveyances to perfect the legal titles (pp. 611-612). There was no dispute "about the construction of the patents or the decrees on which they rest".

"Here, the *United States* have recognized the existence of *the right of the original Mexican grantees to the land which has been patented*, and *by the patents* invested them *with any title which passed under the treaty from the Mexican Government to that of the United States*" (p. 610).

The reservation of the alleged easement should have been embodied in the decree and patent—some illustrative cases.

In the case of the Indian Easement of Occupancy, Harvey v. Barker, 126 Cal. 262, 181 U. S. 481, it was

pointed out by the Supreme Court of California that the confirmed grant to Warner, in distinction from the earlier and rejected grant to Pico, "omits entirely the clause 'not to molest (prejudicor) the Indians that thereon may be established'" (p. 265). Again, that in a case cited to support the easement, "it was *expressly* provided in that grant that 'he shall in no way disturb or molest the Indians who are established or living thereon at the present time'" (p. 268). Again, "the grant to Warner *neither reserved nor preserved* any possessory or other right or supposed right in the Indians" (p. 270). Again, "we are not permitted to go behind the patent in a case like this" (p. 271). And again: "It is claimed that Warner took his title subject to the trust or right of the Indians. Neither the *grant* nor the *patent* contains anything to support this contention" (p. 277). And finally: "The decision of the Land Commissioners and other appropriate officers of the government of the United States, holding to the effect that the land in question was, at the time it was granted, *vacant* and subject to *absolute alienation*, is *conclusive* on the defendants and all others" (p. 277).

And in this court, it was said (181 U. S., p. 490):

> "As between the United States and Warner, the patent is as conclusive of the title of the latter *as any other patent* from the United States is of the title of the grantee named therein".

And again:

> "The grant to Pico was made subject to the condition that he should 'not molest the Indians that thereon may be established'. *No such condition was attached to the subsequent grant to Warner*" (p. 498).

In Los Angeles v. Los Angeles Milling Co., 152 Cal. 645, 649, the court in speaking of the patent, issued on a confirmed Mexican grant, says: "The patent does not contain on its face any reservation or exception".

U. S. v. Osio, 23 How. 273, was concerned with the title to an island in the Bay of San Francisco, claimed, not under the law of 1824 or the regulations of 1828, but under special executive orders issued to the governor by the Mexican government. The application for the island was made to the governor in 1838. He referred it "to the military commandancy" north of San Francisco, for a report (p. 276). Mr. Justice Clifford, writing the opinion of the court, goes on to say:

> "That office was filled at the time by Mariano G. Vallejo, who accordingly reported, on the 7th day of the same month, that the island might be granted to the petitioner; but suggested that it would be well *to make an exception in the grant*, to the effect that, whenever the government might desire or find it convenient *to build a fort* on the principal height thereof, it should not be hindered from so doing. With that report before him, the governor, on the 19th day of February, 1838, made a decree, wherein he states that he had concluded to grant to the petitioner the occupation of the

> island in question, 'to the end that he may make such use of it as he may deem most suitable, to build a house, raise stock, and do everything that may concern the advancement of the mercantile and agricultural branches—*upon the condition that, whenever it may be convenient, the government may establish a fort thereon*'" (p. 276).

Mr. Justice Clifford observes:

> "All that the decree purports to grant to the petitioner, in any view which can be taken of it, is the right or license to occupy the island for the purposes therein described, subject to the right of the government to enter at any time and appropriate the premises as a site for a military fort" (p. 277).

The decree of confirmation, made and entered by this court in *Mitchel v. United States,* 9 Pet. 711, 761, is illustrative. It provides:

> "And this court doth, in like manner, order, adjudge, determine and decree, that the title of the petitioner to so much of the tract (describing it) as shall not be included *in the exception hereinafter made,* is valid by the laws, treaty, and proceedings as aforesaid; with the *exception* of so much of the last mentioned tract *as includes the fortress of St. Mark's and the territory directly and immediately adjacent and appurtenant thereto,* which are hereby *reserved for the use of the United States*" (p. 761).

Again:

> "If the boundaries of the said cession cannot now be ascertained, then the adjacent lands which were considered and held by the Spanish government, or the Commandante of the Post,

> as annexed to the fortress for military purposes, shall still be considered as annexed to it, and *reserved with it for the use of the United States"* (p. 762).

If no evidence be available to fix the extent of these reserved lands, "then so much land shall be comprehended *in this exception* as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies" (p. 762).

If proof of the military usage be not at hand, then it is decreed that a description of territory, set forth by courses in the decree, "shall be, and the same is hereby declared to be, *the territory reserved* as adjacent and appurtenant to the fortress of St. Mark's, and as such *reserved for the use of the United States"* (p. 762).

The decree of the lower court—which had rejected the grant—was reversed "in all matters and things therein contained, *with the exception aforesaid"*, and this court, "proceeding to render such decree as the said court ought to have rendered", adjudges the confirmation of the claim "to all the land embraced therein, *except such part as is hereinabove excepted"* (p. 762).

The clerk of this court is directed to certify the decree to the surveyor general of Florida, with directions to lay off the lands in accordance with the grant, *excepting,* nevertheless, *such part* of the tract * * * as is hereby declared to be the territory of the United States, *pursuant to the exception hereinbefore mentioned";* and as to the tract

subject to the exception, "to lay off the same, so soon as the extent of the land, *herein excepted and reserved for the use of the United States,* shall be ascertained in the manner hereinbefore directed" (p. 763).

And it is further adjudged by this court, that the extent and boundaries of the land *"thus excepted and reserved"* shall be determined by the Superior Court of the Middle District of Florida in such manner and by such process as is prescribed by the Acts of Congress relating to the claims of lands in Florida (p. 763).

In Lynch v. Bernal, 9 Wall. 315, the lands involved were within the corporate limits of the City of San Francisco. Lynch deraigned his title from the City of San Francisco, under the Van Ness Ordinance of that city, and the confirmatory act of the state legislature—depending ultimately on the decree of confirmation and patent to the city, as the successor of the former pueblo. Bernal deraigned his title from a Mexican grant, made in 1834 by the governor of California, and duly confirmed, surveyed and patented.

> "The position of the defendants is, that, by the possession of the party through whom they claim, and the operation of the Van Ness ordinance, they acquired an older and superior title," said this court, "to that ceded to Bernal by the grant of Figueroa (Mexican governor). This position assumes that the city possessed the title to the premises in controversy at the time the ordinance was passed; whereas, though the city was then asserting, in the courts of the

United States, her claim to four square leagues, the boundaries of the tract were not defined, nor was it known *what exceptions and reservations might be* made from the claim when it should be considered and finally determined. Whoever received deeds from the city, or asserted title to parcels of land under the Van Ness ordinance, whilst the claim of the city to the land was thus pending, necessarily held whatever they took, subject to the final determination of the claim. Their title stood or fell with the claim" (p. 324).

The court continues:

"Now, when the final decree upon the claim was made, *there were excepted* from the tracts confirmed, *such* parcels of land as had been, *by grants from lawful authority,* vested in private proprietorship, and had been finally confirmed to parties claiming under said grants by the tribunals of the United States, or should thereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings then pending therein for that purpose. *This exception* is not limited to parcels of land claimed under perfect grants, as contended by counsel, but includes all parcels claimed by private parties under grants from the authorities of the former government, the claims to which had been subjected, or might in proceedings then pending, be subjected, to the examination of the tribunals of the United States, and had been or might be, confirmed by them.

"*The object of the exception* was *to prevent any possible controversy* between parties claiming under the city, and parties holding under grants adjudged valid by the tribunals of the United States; and to protect the latter *from being harassed by further litigation respecting their title.*"

Again:

> "The *exception* excludes, therefore, from confirmation to the city, the land granted to Bernal, and the Van Ness Ordinance did not operate to pass any right or interest in the demanded premises to the party through whom the defendants claim" (pp. 324-5).

The language of the decree of confirmation to the city, is set forth by the court. "In May, 1865, the Circuit Court confirmed the claim to four square leagues, *subject to the following deductions, namely:*

> "Such parcels of land as have been heretofore *reserved or dedicated to public uses by the United States;* and *also* such parcels of land as have been, by grants from lawful authority, vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings pending therein for that purpose; all of which said *excepted* parcels of land are included within the area of four square leagues, above mentioned (those described as confirmed), *but are excluded from the confirmation to the city"* (pp. 318-319).

Grisar v. McDowell, 6 Wall. 363, was an action of ejectment brought by Grisar against General McDowell to recover a tract of land in San Francisco, lying within the Presidio or military reservation as declared and delimited by President Fillmore in December, 1851.

Grisar claimed, as owner in fee, under title from the City of San Francisco. McDowell defended as

an officer of the United States, claiming possession as of public property of the United States reserved for military purposes.

In December, 1854, on a petition for confirmation presented by the city in July, 1852, the Board of Land Commissioners confirmed the claim of the city to a portion of the land within this reservation, and within that portion, so confirmed, the demanded premises were embraced. In June, 1855, under the Van Ness ordinance of that year, ratified subsequently by the state legislature, whatever title the city had to the premises, as of January 1, 1855, passed to the grantor of the plaintiff (pp. 365, 366).

> "In stating the City's title, it has been said that the Board of Land Commissioners, in December, 1854, confirmed the claim of the city to a part of the four leagues claimed by it as a pueblo, *which part included these premises.* If the matter had stopped there, the case of the plaintiff might have been free from question. But it did not stop there. The sequel was thus:
>
> 'In March, 1856, a transcript of the proceedings and decision of the board was filed in the district court of the United States; this operating, under the statute of August 31, 1852, as an appeal by the party against whom the decision was given. *Both* city and United States in this case considered the decision as against them, and *both* gave notice of their intention to appeal. The appeal of the United States was, however, on notice of the attorney general and the stipulation of the district attorney, *dismissed,* and the *city alone prosecuted its appeal*' " (p. 367).

Pending this appeal by the City, the case was transferred, by act of Congress, to the Circuit Court of the United States, and that court, in May, 1865, confirmed the claim of the city to the four leagues "*excepting,* among others, such parcels of land as had been *previously reserved or dedicated to public uses by the United States,*—meaning by this, the tracts reserved as above mentioned, by the then President, Mr. Fillmore" (p. 368). The United States appealed from this decree. Thereafter, Congress relinquished (Act of March 8, 1866, 14 Stat. 4) the rights of the United States to the land confirmed, "subject, however, to the reservations and exceptions designated in that decree"; and accordingly the appeal of the United States was dismissed (p. 368).

Now, then, it will appear from the decision of this court, that if the City of San Francisco had remained content with the decree of the Board of Land Commissioners, which confirmed to the City a part of the military reservation, including the demanded premises, that decree would have "closed the controversy between the city and the United States", and would have carried the land in question to the city and to the plaintiff, Grisar, its subsequent grantee;—and this, *notwithstanding* the previous reservation—not a potential reservation, but a reservation actually made by the President for military purposes.

At the date of the conquest July 7, 1846, there was a pueblo "of some kind" in San Francisco, and a

municipal organization going back to the year 1835. This pueblo had some claim, legal or equitable, to some interest in lands within the four square leagues. It had been the general policy of Spain and Mexico to assign lands to the pueblos, for the use and benefit of the town and its inhabitants.

> "Such assignment was to be made by the public authorities of the government upon the original establishment of the pueblo, or afterwards upon the petition of its officers or inhabitants, and the land was to be measured off in a square or prolonged form, according to the nature and condition of the country. All lands within the general limits stated, *which had previously become private property*, or were *required for public purposes*, were reserved and excepted from the assignment" (pp. 372-3).

It was from the vacant public lands, that the assignment was made to the public establishment or pueblo, for its municipal purposes, and in trust for the use of its inhabitants. No more under such an assignment, than under a grant in colonization or settlement, pursuant to the law of 1824 and the regulations of 1828, was the right of private property impinged upon. It was from the ungranted lands that the assignment was made. In the learned and elaborate opinion of the present Chief Justice, in U. S. v. Santa Fe, 165 U. S. 675, 709, the language just quoted from Grisar v. McDowell, supra, is reproduced, and the Chief Justice goes on to say:

> "The general theory of the Spanish law on the subject indicates that, even after a formal designation, the control of the outlying lands, to which a town might have been considered en-

titled, was in the King, as the source and fountain of title, and could be disposed of at will by him, or by his duly authorized representative, *as long as such lands were not affected by individual and private rights.*"

And further, by the Chief Justice (p. 711):

"It was doubtless a consideration of the state of the Spanish law and the unquestioned power lodged in the King of Spain to exercise unlimited authority over the lands assigned to a town, *and undisposed of and not the subject of private grant* (to all of which rights the United States succeeded as successor of the King of Spain and the Government of Mexico), which caused Congress, in enacting the laws of 1864 and 1866, to carve out of the claim of San Francisco such land for public purposes as it saw fit, to authorize further reservations to be made within a period of one year, and to subject the lands relinquished to specific trusts imposed not alone upon the municipality of San Francisco, but also upon the general assembly of California."

The court proceeds in Grisar v. McDowell (p. 373):

"Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one. It was a right which the government might refuse to recognize at all, or might recognize in a qualified form; it might be burdened with conditions, and it might be restricted to less limits than the four square leagues, which was the usual quantity assigned. Even after the assignment, the interest acquired *by the pueblo* was far from being an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require *their* pos-

> session of the fee. The interest, as we had occasion to observe in the case already cited (Townsend v. Greeley, 5 Wall. 336), amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. And this *limited right* of disposition and use was in all particulars subject to the control of the government of the country" (p. 373).

But no assignment of lands had been made to the pueblo of San Francisco under the former government. Hence the necessity of an examination and confirmation, under the law and procedure of the new government, to turn the imperfect right of the pueblo "into an absolute and indefeasible estate". That was accomplished by the decree of confirmation (p. 374), and by the confirmatory action of Congress, the organ of the national authority (pp. 378-9).

Having regard, now, to the limited character of the pueblo right, and to the ultimate and overruling jurisdiction of the general government, except as against intervening private rights of ownership, this court determines, as the result of a decree of confirmation under the act of March 3, 1851, that a reservation made by the President of the United States for military purposes, must abide the event of the proceedings in confirmation, and is controlled by the decree therein made of the commissioners and the courts. The United States, it has been seen,

dismissed its appeal from the decree of the board. That decree confirmed to the City a part of the military reservation, including the premises claimed by Grisar. The City insisted on going on with its appeal, instead of accepting the leave granted by the district court to proceed upon the decree of the board as upon a final decree. "This kept open the whole issue with the United States", for the so-called appeal was really a suit *de novo* (p. 375). To quote the language of the court (pp. 374-5):

> "The counsel of the plaintiff (Grisar), contend, that this decree (of the Board) *closed the controversy* between the city and the United States as to the lands to which the claim was confirmed. But in this view they are mistaken. *Had the city accepted* the leave granted, withdrawn her appeal, and proceeded under the decree as final, *such result would have followed.* But this course she declined to take. She continued the appeal for the residue of her claim to the four square leagues. This kept open the whole issue with the United States."

It was consequently held that the City was bound by the decree of the circuit court, in the proceeding *de novo* which it had insisted on prosecuting, and that, by the express terms and exceptions of that decree, the land reserved by President Fillmore, was excluded from the operation of the decree of confirmation. Such reserved lands remained in the United States, no title thereto vested in plaintiff, and his action to recover possession failed.

So much, too much, for a decree of confirmation and a patent, passing the fee, and containing no reservations. Perhaps this statement is not precisely accurate; for the patent here does contain a reservation, but not the one desired. Its granting clause reads:

> "Now know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the Act of Congress aforesaid of 3d March, 1851, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant, unto the said Archibald C. Peachy and William H. Aspinwall, *and to their heirs*, the tract of land embraced and described in the foregoing survey, *but with the stipulation* that in virtue of the 15th section of the said Act the confirmation of this said claim and this patent shall not affect the interests *of third persons.* To have and to hold the said tract, with the appurtenances, unto, the said Archibald C. Peachy and William H. Aspinwall, *and to their heirs and assigns forever, with the stipulation aforesaid*" (Tr. p. 33).

So much, then, and too much, for the matter of reservations. "We do not think it necessary", this court has said (Pumpelly v. Green Bay Company, 13 Wall. 166, 182) to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee *by patent without reservations*, it retains no right to take that land for public use *without just compensation*".

III.

IN NO EVENT, UNDER THE ACT OF MARCH 3, 1891, 26 STAT. 1095, 1099, CAN THE PLAINTIFF GO BEHIND THE PATENT.

Section 8 of the Act reads:

> "That suits by the United States to vacate and annul any patent heretofore issued, shall only be brought within five years from the passage of this Act; and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patent."

The patent here, was issued on June 11, 1869 (Tr. p. 33).

In Harvey v. Barker, 181 U. S. 481, 490, it was said:

> "As between the United States and the Indians, their failure to present their claims to the Land Commission within the time named, made the land, within the language of the statute, 'part of the public domain of the United States'."

The Indian easement of occupancy, as between the Indians and the United States, passed into the public domain, and merged in the fee.

> "If, as claimed, it were a right to possess, occupy, and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple *or possessory merely*, derived from the Mexican government; under the Act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation" (Harvey v. Barker, 126 Cal., p. 274).

And so, here, the "easement" alleged is "a title or right to property * * * possessory merely, derived from the Mexican government", and it is a title or right to property in public lands, if in anything; so far forth as it is claimed to exist, it is an interest issuing out of "these lands", the "lands of the nation", the public lands (Law of 1824, supra). The reservation of public land for military purposes is a familiar and typical thing in the administration of the public lands; such was the reservation upon which General McDowell stood in the Presidio case. Congress may establish a reserve, it may disestablish it, it may release it. These are rights incident to its proprietorship of the public lands (Light v. U. S., 220 U. S. 523, 537).

U. S. v. Chandler Dunbar Co., 209 U. S. 447, was a bill in equity by the United States to remove a cloud from its title to two islands in the Sault Ste Marie, between Lake Huron and Lake Superior. The defendant claimed the land under a patent from the United States, dated December 15, 1883. The United States replied,

> "that the patent was void *because the land had been reserved for public purposes*, and that even if it was valid, the islands did not pass. The defendant denied that the land was reserved, and, further, interposed the statute of limitations, above quoted, of March 3, 1891."

This court assumed that the land had been reserved, and turned the decision on the Act of March 3, 1891.

"The statute just referred to", said the court, "provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act', that is to say, from March 3, 1891. This land, whether *reserved* or not, *was* public land of the United States, and in kind open to sale and conveyance through the Land Department. U. S. v. R. R. Co., 165 U. S. 463, 476. The patent had been issued in 1883, by the President in due form and in the regular way. Whether or not *he* had *authority* to make it, the *United States had power to make it,* or to *validate it when made,* since the *interest* of the United States was the *only one* concerned. We can see no reason for doubting that the statute, *which is the voice of the United States,* had that effect. It is said that the instrument was void, and hence was no patent. But the statute pre-supposes an instrument that might be declared void. When it refers to '*any* patent heretofore issued', it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents, it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599.

"In form, the statute only *bars suits* to annul the patent. But statutes of limitation with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Liffingwell v. Warren, 2 Black, 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place."

Northern Pacific Ry. Co. v. U. S., 227 U. S. 355, was a case under the act of March 2, 1896 (29 Stat. 42, c. 39). This act related to railroad or wagon road grants. It provided that suits brought by the government to vacate and annul any patent to lands theretofore erroneously issued under such a grant, should only be brought within five years from the passage of the act, and, as to patents issued after the passage of the act, should only be brought within six years (p. 367).

The Yakimas, an Indian tribe, by treaty with the United States, had ceded and conveyed to the United States a tract of land, explicitly described, reserving, however, by Article 2 of the treaty, the land included within specified boundaries (p. 356). It was to this land, so reserved and belonging to the tribe, that the railroad company laid claim under its patent. It was held that the limitation of the Act of 1896 applied only to the *public lands of the United States,*—not to the lands of an Indian tribe (p. 367). The patent was therefore vacated, as having been "erroneously" issued for lands belonging, not to the United States, but to the Indians. "It must be borne in mind", this court said, "that the Indians had the primary right. The rights the government had are derived *through the cession from the Indians*" (p. 366).

LaRoque v. U. S., 239 U. S. 62, turned on the validity of an allotment of Indian lands, tribal lands, to an individual member of the tribe.

The land in question was part of the White Earth Indian Reservation in Minnesota. Under the Act of January 14, 1889, 25 Stat. 642, known as the Nelson Act, a trust patent had been issued to a Chippewa Indian, Vincent LaRoque by name, entitling him to an individual allotment under that act. He died shortly after 1889, "without an allotment being selected by or for him" (p. 64). After his death, an application for allotment was made in his name; and in his name, the allotment was accordingly made, and the trust patent issued,—all as though he were a living man. His son, Henry LaRoque, himself entitled, as a Chippewa Indian, to an individual allotment out of the tribal land, claimed as well, in his status of heir at law, the additional land which had issued under the allotment and trust patent in the father's name.

The Secretary of the Interior had ruled that, under the Nelson Act, there could be no allotment except to living Indians (p. 64)—notwithstanding an eminent military authority to the effect "that there are no good Indians except dead Indians". This court held, on a view of the Nelson Act, that its terms "contemplated only selections on the part of living Indians acting for themselves or through designated representatives", and "that the incidents of tribal membership, like the membership itself, are terminated by death" (p. 66). In closing, the court alludes to Northern Pacific Ry. v. U. S., supra, and remarks that "this trust patent was not issued for *public lands of the United States,*

but for reserved Indian lands to which the public land laws had no application" (p. 68). And it may be pertinent to notice a remark of the court touching the decree itself; "It may be well to observe in passing", it is said, "that the Circuit Court of Appeals directed *that there be embodied in the decree* a provision that the government holds the lands in the same way it held them before the patent was issued, that is, as *reserved* Indian lands" (p. 68).

U. S. v. Whited, 246 U. S. 560, was a suit to recover, not any public *lands* covered by a patent, but the *value* of such lands, where the patent was alleged to have been procured from the government by fraud.

The statute of limitations, as this court looked at it,

> "relates to the remedy, and *in terms* applies only to *one* remedy, that for annulling the *patent*. The right of the government, asserted in this case, really springs from the *fraudulent obtaining* of the patent, not from the patent itself" (p. 561).

And further:

> "The statute was passed to promote prompt action for annulling patents where cause therefor was believed to exist, and *to make titles resting upon patents dependably secure* when the period of limitation should expire. As might well be anticipated, therefore, this statute, originating in such conditions, was limited in its terms to suits to vacate and annul patents,

without any reference being made to suits to recover *the value* of the land when patents were *fraudulently* obtained" (p. 562).

And again:

"The *omission* of language barring the right of the government to recover *the value* of lands to which a patent had been *fraudulently* obtained, was intentional and deliberate, to the end *that patent titles might be made secure,* but that persons who had *defrauded* the government should not be protected by the act in the enjoyment of their ill-gotten gains" (p. 563).

Reference is then made to the Chandler-Dunbar case:

"The support for the contention of the defendants in error, contrary to this conclusion, which they claim to find in U. S. v. Chandler-Dunbar Water Power Company, 209 U. S. 447, is based upon the statement that by the statute the patent 'is to have the same effect against the United States that it would have had if it had been valid in the first place', but that is merely an emphatic way of saying that the *title* is made *good*" (p. 563).

We are not concerned, in the case at bar, with *a damage suit* by the United States to recover *the value* of land out of which it has been defrauded by a patentee. If the patent here, in its terms and scope, was "erroneously" issued, the United States is now foreclosed to raise that question.

It is submitted:

I. The grant to Carrillo, as an original question, was not subject to the alleged easement of occupancy for military and naval purposes.

II. The decree of confirmation and the resulting patent ascertained and settled the title of this respondent conclusively between the United States and respondent.

III. In no event, under the Act of March 3, 1891, 26 Stat. 1095, 1099, can the plaintiff go behind the patent.

The decree of the District Court should be affirmed.

Respectfully submitted,

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